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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 203

ANTHONY CARDARELLA and FELIX FERINA,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

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No. ____

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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Anthony Cardarella and Felix Ferina respectfully pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit in the consolidated cases of Anthony Cardarella, Appellant, v. United States of America, Appellee, numbers 16,786 and 16,911 and Felix Ferina, Appellant, v. United States of America, numbers 16,783 and 16,908, entered on April 17, 1962.

OPINIONS BELOW.

No opinion was filed by the trial court. The judgments in the trial court are set out in the Appendix, pages A7 to A10. The opinion of the Court of Appeals is not yet reported but is set out at pages A37 to A75, inclusive, of the Appendix attached hereto.

JURISDICTION.

The jurisdiction of this Court to entertain the instant petition for Certiorari is based upon Section 1254 (1), Title 28, United States Code.

The judgments of the Court of Appeals sought to be reviewed were entered on April 17, 1962 (true copies of said judgments of the Court of Appeals are set out at pages A76 to A79, of the Appendix hereinafter). Petitioners' timely Petition for Rehearing was overruled by the Court of Appeals on May 14, 1962. A copy of said petition for rehearing is set out at pages A79 to A89 of the Appendix. On May 23, 1962, the Court of Appeals entered an order extending the stay of the mandate in the cases of Anthony Cardarella v. United States, numbered 16,786 and 16,911 for a period of thirty days from said date.

QUESTIONS PRESENTED.

Petitioners herein respectfully submit that the United States Court of Appeals for the Eighth Circuit in its opinion and judgments herein has decided Federal constitutional questions in a way in conflict with applicable decisions of this court; has rendered decisions in conflict with the

decisions of other United States Courts of Appeals on this same matter, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the court's power of supervision. The questions presented are:

1. Whether submissible cases for the jury were made under the substantive counts of the indictment (Counts I and II) upon the charges of interference with a Federal Government witnes. to prevent him from testifying when there was no evidence appellants, or either of them, had any knowledge or information there was in existence such a person as Anthony J. Biase, or that he was being prosecuted in the Federal Court in Omaha, Nebraska, or that Sheetz might be a witness in such prosecution, or that the assault on Sheetz was for the purpose of preventing him from testifying in said proceedings?

2. Whether a submissible case for the jury was made under the conspiracy count of the indictment (Count IV) when there was no evidence of the essential elements of the substantive offense, as set forth above, and when there was the further absence of any evidence that Biase, the defendant in the pending proceedings in Omaha, had any connections with appellants or the alleged conspiracy and his conviction was reversed herein by the Court of Appeals; when there was no evidence appellants had been seen together or had communicated with each other during the pendency of said Omaha prosecution and prior to the assault or had any interest in or connection with the narcotics traffic or any motive for preventing Sheetz from testifying in said proceedings?

3. Whether the conviction of appellants without evidence that appellants, or either of them, had ever heard of Anthony Biase, had any knowledge or information he

was being prosecuted in a Federal Court in Omaha, Nebraska, or that Sheetz might be a witness in that case, or that the assault on Sheetz was for the purpose of preventing him from testifying in said proceedings, deprived appellants of due process of law in violation of their rights under the Fifth Amendment to the Constitution of the United States?

4. Whether the trial court committed prejudicial and reversible error in overruling the objections of defense counsel to the argument of the Special United States Attorney in charge of the prosecution wherein he stated that he vouched for Sheetz as a witness; that there never was a witness more impressive; that Sheetz told the story as he knew it and thereby brought the opinion herein into conflict with controlling opinions of this Court and into conflict with opinions of United States Courts of Appeals for other circuits?

5. Whether the District Court committed an abuse of discretion and brought this opinion into conflict with controlling decisions of this court in overruling appellants' motions for a new trial on the grounds of newly discovered evidence which Government Police Officer witness Robert W. Sanders studiously concealed in giving testimony in depositions and in three trials, and which the prosecution failed to divulge; the newly discovered evidence being that the prosecuting witness Sheetz, the only witness identifying appellants, almost immediately after being shot, told Officer Sanders he had been shot by two colored men, evidence of utmost importance on the vital issue of identification and directly contradictory of Sheetz' trial testimony herein, and in previous trials and depositions, wherein he identified these two white appellants as his assailants?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Fifth Amendment to United States Constitution, Section 1503, Title 18, United States Code. Section 371, Title 18, United States Code. Rule 33, Federal Rules of Criminal Procedure.

The Constitutional Provision and Statutes involved, so far as pertinent, are set out in the Appendix, *infra*, pp. A1-A2.

STATEMENT.

During 1959, Kenneth Bruce Sheetz, the government's chief witness and the only witness to connect appellant with this case in any manner, made three or four purchases of narcotics from Anthony (Tony) Biase in Omaha, Nebraska. (Tr. 101) Sheetz sold this "dope" on three occasions to a blond haired woman about 28 years of age in Kansas City, Missouri. (Tr. 157) Two of these sales were made to this young woman by Sheetz directly and one was made indirectly through a man named "Swede". (Tr. 158) Thereafter, during early September, 1959, Sheetz was arrested in Kansas City for the sale of narcotics (Tr. 101) and taken to the Jackson County jail. On about September 21, 1959, Sheetz began working with Bernard A. Theisen, Jr., a 32 year old narcotics agent employed by the Treasury Department, in efforts to keep himself out of the penitentiary. (Tr. 32, 33, 37) Sheetz continued to work with Theisen until the following March and during this period of time spent about sixty percent of his time with Theisen. (Tr. 33) Theisen does not know what Sheetz was doing during the remaining forty percent of the time.

(Tr. 25) During the above period, Sheetz and Theisen traveled in about twenty states, worked in about eight or ten of these states and Sheetz was holding himself out as a narcotic buyer and also as a narcotic seller (Tr. 26) and while working together they traveled, ate and slept together. Sheetz received no compensation for this work except per diem and travel expenses. (Tr. 35)

Sheetz took Treasury Agent Theisen to Omaha and introduced him to Anthony Biase and some others. (Tr. 36, 100) Biase made two sales of narcotics to Theisen in Omaha. (Tr. 9, 11) Theisen and Sheetz then appeared before a Grand Jury in Omaha and testified against Biase resulting in his indictment. (Tr. 17, 18, 106) After returning to Kansas City Sheetz did not discuss with anyone his appearance before the grand jury in Omaha. (Tr. 107)

While he was working with Theisen, Sheetz' bond was cancelled and he was committed back to jail from about April 1 to May 3, 1960. (Tr. 105) During his commitment Sheetz pleaded guilty to the narcotics charges but was not sentenced and at the time of this trial had not been sentenced. (Tr. 105) Sheetz testified he knew he could get a long term for sale of dope (Tr. 161) and he was doing everything he could to avoid serving time for his narcotics violations. (Tr. 161, 30)

Sheetz' long previous criminal record is summarized on page 4 of this petition.

On the morning of June 20, 1960, Sheetz was shot four times (Tr. 100, 108, 109, 115) while in the front doorway on the front porch of his home in Kansas City (Tr. 115) by one of two men who were inside the house which was fairly dark. Sheetz, although near sighted and not wearing his glasses, saw the gun and the two men all in one fifth of a second before he was shot. (Tr. 135, 136, 137)

He later got a quick glimpse of the smaller of the two men in the doorway. (Tr. 172, 173) He told Officer Sanders (the first officer to reach him) that he knew who shot him but declined to tell the officer who they were. (Tr. 206, 210) Officer Sanders testified Sheetz would not tell who shot him. (Tr. 210)

During the day he told Officer Kelly he knew who shot him but was not ready to tell who they were. (Tr. 261, 260, 139) Later that evening he stated his assailants were these appellants. (Tr. 129, 168, 169)

Some indefinite time later Sheetz for the first time stated that the man holding the gun, whom he identified as appellant Anthony Cardarella, as he fired the final shot said: "Here's something from Tony." (Tr. 114, 149) Appellants were not arrested until nearly a month after the shooting. (Tr. 263)

The identification of appellants rests entirely on the testimony of Sheetz. The men who shot Sheetz were seen in broad daylight out in the open by a letter carrier, John Marvin Nelson, Jr. (Tr. 189-196); a school teacher, Anna Mae DeWitt (Tr. 196-205); and a truck driver, Donald L. B. Erwin. (Tr. 214-222) These people were all totally disinterested and testified as witnesses for the Government. Not only did they all positively refuse to identify either appellant as one of the men seen on that occasion (Tr. 202, 221, 194) but they testified to descriptions of the men seen leaving the Sheetz home and proceeding down the street which positively disproved either appellant was one of such men. (Tr. 194, 202, 198, 217)

Although the Government found three cards of latent fingerprints on the rear door of Sheetz' home where the assailants broke in, found a crowbar, a blue glove, a leather glove, a golf cap, a white handkerchief, a cartridge case, a

prybar, a revolver and remnants of .38 caliber bullets (Exhibits 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19, Tr. 208, 277, 272, 252), there was no evidence connecting any of those exhibits with these appellants.

Ferina was acquitted in the state court and the state dismissed as to Cardarella. (Opinion, Court of Appeals, Appendix p. A63)

There was no evidence that either appellant knew or ever heard of Anthony Biase of Omaha. There was no evidence either appellant knew there was a pending action in federal court in Omaha or that Sheetz might be a witness in said action. There was no evidence either appellant ever had any interest in or connection with the narcotics traffic. There was no evidence of any communication, either directly or indirectly, between appellants and Biase or anyone else in Omaha.

The record facts as to alleged newly discovered evidence are omitted here in the interest of brevity and set out under point 3 of the reasons for granting the writ. The same is true as to the facts concerning the prejudicial arguments which are set out under point 4 of reasons for granting the writ.

Further facts will also be set out hereinafter in connection with the particular points to which they are applicable.

REASONS FOR GRANTING THE WRIT.

1. There Is No Evidence That Appellants, or Either of Them, Had Any Knowledge That There Was a Pending Prosecution in the Federal Court in Omaha Against Biase or That Sheetz Might Be a Witness Therein or That It Was Because of Said Proceedings and the Status of Sheetz That He Was Assaulted.

The substantive offense charged here is interference with a Government witness in a proceeding in a Federal Court under 18 U.S.C., Sec. 1503. Indictment, Appendix pp. A3-A6.

The burden was on the Government to prove beyond a reasonable doubt that appellants, or either of them, had knowledge of the pending prosecution of Biase in Omaha and that Sheetz might be a witness in said proceedings and that it was because of such status that Sheetz was assaulted. *Pettibone* v. *United States*, 148 U.S. 197, 13 S. Ct. 542, 37 L. Ed. 419; *Hargett* v. *United States*, 5 Cir., 183 F.2d 859, 864, 865; *Henderson* v. *United States*, 4 Cir., 24 F2d 811, 812.

In the case of *Oyama* v. *State of California*, 332 U.S. 633, 636, 68 S. Ct. 269, in a Certiorari proceeding, the Court said (l.c. 270):

> "[1] In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled."

In the case of *Crowell* v. *Benson*, 285 U.S. 22, 60, 52 S. Ct. 285, the Court said (l.c. 296):

> "[11] In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."

In the case of *Odom* v. *United States*, 5 Cir., 116 F.2d 996, 999, the Court affirmed the charge and judgment of the trial court in a prosecution under this statute wherein the trial court said (l.c. 999):

> " 'The defendant must have known or must have had reasonable grounds for believing that the case was pending in the United States District Court and that Stansbury was a witness in that case * * * and it must have been for the purpose of attempting to influence, intimidate or impede Stansbury from testifying, etc.' "

On Certiorari, the Solicitor General confessed error and this Court granted the writ and reversed and remanded the case to the District Court for further proceedings. *Odom* v. *United States*, 313 U.S. 544, 61 S. Ct. 957.

In his memorandum confessing error the Solicitor General acknowledged that the obstruction of justice statute "recognizes as an essential element of liability actual knowledge or belief that the person assaulted was or is a witness in a federal court." He admitted the test applied was a subjective one—there must be actual knowledge or belief and this instruction "permitted the jury to apply the objective standard of what the (defendants) ought to have known rather than the subjective standard of what they did know." See *United States* v. *Solow*, U.S. D.C., S.D. N.Y., 138 F. Supp. 812 (l.c. 816, footnote 14, discussing and quoting from the Solicitor General's memorandum in the Odom Certiorari matter in this Court).

Sheetz' name was not indorsed on the Omaha indictment. (Tr. Govt. Exh. No. 1, Tr. 19, 21) There is no evidence there was any publicity given the fact Sheetz was a witness before the grand jury in Omaha. Sheetz testified he did not discuss the Biase prosecution with anyone in Kansas City. (Tr. 107) Even had there been such publicity, there was no evidence appellants, residing in Kansas City, 219 miles from Omaha, saw or had any notice thereof. There is no evidence either appellant had ever been in Omaha, knew anyone in Omaha, or had any interest or connections with anyone in Omaha.

There is no evidence either appellant had ever even so much as heard of Biase. There is no evidence that either appellant had ever had any connection with or interest in the narcotics traffic. There is no evidence either appellant had any knowledge there was a prosecution pending against Biase in the Federal Court in Omaha or that Sheetz might be a witness in said proceedings. There was no evidence either appellant could have had any interest or motive in preventing Sheetz from testifying against Biase in Omaha.

The action of the Court of Appeals in reversing the case outright as to Biase for want of any evidence seems to us conclusive proof of the total lack of any community of interest or cooperation between appellants and Biase or anyone representing his interest.

Sheetz told Officer Sanders almost immediately after the shooting that he was assaulted by two colored men (a fact which Sanders concealed until after this trial. See point 5 following herein.) During the remainder of the day he refused to name his assailants, saying he was not ready to do so. (Tr. 139, 260, 261) It was not until the evening, following the shooting that morning, that Sheetz

named appellants as his assailants. (Tr. 139) At still a later time Sheetz first stated that the assailant holding the gun, as he fired the last shot, said "here's something from Tony". (Tr. 114, 113, 162) The man he identified as making such statement was appellant Anthony (Tony) Cardarella. (Tr. 113, 162) Sheetz admitted he knew three or four Tonys other than Cardarella and Biase. (Tr. 104) Sheetz claimed Tony Biase was the only Tony who had any reason to want to have him shot. (Tr. 104) and from that evidence alone the jury and courts below have based their verdicts and judgments.

Such findings are based on a pyramiding of speculative and unsupported inferences.

To reach such finding it must be inferred that appellants had heard of Biase (of which there was no evidence); that appellants had knowledge that Biase was being prosecuted in the Federal Court in Omaha (of which there was no evidence); that appellants had knowledge that Sheetz might be a witness in the case pending against Biase in Omaha (of which there was no evidence) and it must be further inferred that the assault on Sheetz was for the purpose of attempting to prevent him from testifying in the case in Omaha (of which there was no evidence). From the most favorable viewpoint, the evidence (if it can be so dignified) tending to connect appellants or either of them with the prosecution of Biase in Omaha is entirely and totally circumstantial and extremely tenuous as evidenced by the belabored and hypothetical and generalized treatment of that most material issue in the opinion (Opinion pp. 14-16, 18-19) theorizing on how it might be thought possible that appellants were so connected with such prosecution, but never mentioning the many more rational and reasonable explanations for the obvious lack of evidence connecting appellants with the Omaha prosecution. The

Court overlooked and failed to consider the more reasonable and probable explanation for Sheetz accusing Ferina and Cardarella, suggested by counsel for said appellants, to-wit: that Sheetz, a professional burglar, had been again dealing in narcotics while acting as stool pigeon for the Government and awaiting federal sentence on his plea of guilty on the narcotics charges; that he was shot by persons involved with him in narcotics traffic and he dared not let the Government find that out, so that after thinking it over during the day and into the evening after being shot he accused Ferina and Cardarella in the belief they could be made prime suspects as they were little and unimportant men of Italian ancestry who lived in the north end and so were vulnerable to suspicion and prejudice. If he could turn the suspicion of the Government against them and away from the real criminals he hoped to avoid exposure of his own nefarious activities while posing as a stool pigeon for the Government.

We submit further it is more reasonable that a "Tony" worked up to a state of mind that he was trying to kill Sheetz would have reference to himself in saying, "here's something from Tony" rather than having reference to a Tony he had never heard of.

2. There Was No Evidence of a Conspiracy to Obstruct Justice by Assaulting Sheetz or That Appellants, or Either of Them Were Members of Any Such Conspiracy.

We first direct attention to the fact that the Court of Appeals held there was no evidence Anthony Biase of Omaha, the party claimed to be the intended beneficiary of the assault on Sheetz, had any connection with the alleged conspiracy, and his conviction was reversed outright.

The Court overlooked the fact the discharge of Biase, the central figure in the alleged crimes, removes the hub and spokes of the alleged wheel (which never had a shadow of a rim) of conspiracy without which there is no evidence to sustain the conspiracy charge under Count IV and leaves the verdict on that count resting only on a pyramiding of inferences; to show and reach such findings it must be inferred that appellants had heard of Biase; it must be further inferred that they knew Biase was being prosecuted in the Federal Court in Omaha; it must be further inferred that they knew Sheetz might be a witness in that case and it must be further inferred that for some unknown reason appellants were interested in preventing Sheetz testifying against Bias in that case.

In affirming such judgment based on evidence exposing such an obvious hiatus which this court attempts to overcome by the pyramiding of inferences, this opinion is brought into direct conflict with the following decisions: *Kotteakos* v. *United States*, 328 U.S. 750, 755, 66 S. Ct. 1239, 1243; *Canella* v. *United States*, 9 Cir., 157 F.2d 470, 478 (8); *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711, 63 S. Ct. 1265, 1269.

The Government attempted to prove a connection between Omaha and Kansas City through defendant, Carlton A. Young, but the evidence was insufficient and the Court entered a judgment of acquittal in favor of Mr. Young (Tr. 304, 463) and struck out all the testimony theretofore admitted purporting to show some connection or communication between Omaha and Kansas City in relation to the Biase prosecution in Omaha. (Tr. 303, 304, 463, 464, 465) That left a complete hiatus between Omaha and Kansas City as to any connection between them in relation to the Biase prosecution in Omaha. But even the

evidence stricken had no tendency to link Ferina and Cardarella in any way with Young or anyone in Omaha as they were in no way involved therein.

We next call attention to the fact that the Conspiracy Count of the Indictment (Count IV) charged appellants with Biase and others with conspiring to obstruct justice by assaulting Sheetz for the purpose of preventing him from testifying against Biase in the criminal action pending against Biase in the Federal Court in Omaha. (See Indictment, Appendix pp. A3-A6.)

It was therefore an essential element of the conspiracy charge that the Government prove that appellants had knowledge that Biase was being prosecuted in the Federal Court in Omaha; that appellants knew Sheetz might be a witness for the Government in that case, and that the purpose of the conspiracy was to prevent Sheetz from testifying for the Government in the case in Omaha. *Pettibone* v. *United States*, 148 U.S. 197, 13 S. Ct. 542, 37 L. Ed. 419.

In the case of *Ingram* v. *United States*, 360 U.S. 672, 79 S. Ct. 1314, in reversing convictions against two alleged conspirators the Court said (l.c. 1319):

> "[2, 3] It is fundamental that a conviction for conspiracy under 18 U.S.C., § 371, 18 U.S.C.A., § 371, cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States'. *Pereira* v. *United States*, 347 U.S. 1, 12, 74 S. Ct. 358, 364, 98 L. Ed. 435. There need not, of course, be proof that the conspirators were aware of the criminality of their objective, but an essential ingredient of the proof was knowledge on the part of Smith and Law that Ingram and Jenkins were liable for federal taxes by reason of the gambling operation. 'Without the knowledge, the intent cannot exist.'

Direct Sales Co. v. United States, 319 U.S. 703, 711, 63 S. Ct. 1265, 1269, 87 L. Ed. 1674.

"[4, 5] '[C]onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself.' The substantive offense which Smith and Law were accused of conspiring to commit was the wilful evaluation of federal taxes, an offense which, even presuming knowledge of the tax law, obviously cannot be committed in the absence of knowledge of wilfulness. Spies v. United States, supra, Cf. United States v. Falcone, 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128.

"[6-14] Indulging, as of course we must, in that view of the evidence most favorable to the Government, we simply cannot discern adequate foundation in the present record for a finding that Smith and Law had such knowledge of Ingram's and Jenkins' wagering tax liability. The record is completely barren of any direct evidence of such knowledge. It was not shown, for example, that any reference had ever been made by any of the petitioners to possible tax liability, or that they had filed a return or paid a tax in previous years. The Government relied instead upon evidence which, it asserts, circumstantially proved the requisite knowledge on the part of Smith and Law."

The *Ingram* case, *supra*, at l.c. 1320 held:

"What was said in Direct Sales Co. v. United States on behalf of a unanimous Court is of particular relevance here:

'Without the knowledge, the intent cannot exist. * * * Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. * * * This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning * * * a dragnet to draw in all substantive crimes.' 319 U.S. at page 711, 63 S. Ct. at page 1269."

In *United States* v. *Bufalino*, 2 Cir., 285 F.2d 408, the Court, in ordering dismissal of the conspiracy count, stated the law as follows (l.c. 416):

> "Evidence of the same intent or knowledge would be required to convict conspirators as to convict those charged with the substantive offense, Ingram v. United States, 1959, 360 U.S. 672, 677-678, 79 S. Ct. 1314, 3 L. Ed. 2d 1503; United States v. Ausmeier, 2 Cir., 1945, 152 F.2d 349."

There is no evidence in this case, either direct or circumstantial, that appellants, or either of them, ever had any connection with the narcotics traffic. There is no evidence in this case, either direct or circumstantial, that appellants ever met or even heard of defendant Biase before the indictment in this case. There is no evidence, either direct or circumstantial, that appellants had any information, notice or knowledge that defendant Biase was being prosecuted for sales of narcotics in the United States Court at Omaha, Nebraska.

There was no evidence that appellants had ever been in Omaha, Nebraska, were acquainted with anyone there or ever had any connections or communication with anyone in Omaha, Nebraska.

There was no evidence that the newspapers and other publications circulated in the Kansas City area ever carried any account of the indictment or prosecution of appellant Biase in Omaha prior to the assault of Sheetz. Furthermore, it is unlikely that if there had been any such publication it would have mentioned the name of Sheetz as his name was not on the indictment in the Biase case. (Tr. 20, Govt. Exh. No. 1)

Furthermore, even appellant Biase would have little motive for wanting to prevent Sheetz from testifying

against him in Omaha. The real witness in the case and the one who testified against Biase at the trial in Omaha was Federal Narcotics Agent Bernard A. Theisen, Jr. (Tr. 3, 28) Sheetz did not testify in the Biase trial in Omaha. (Tr. 19)

There was no evidence that Biase and appellants had any mutual friends or acquaintances or that they ever communicated with each other, either directly or indirectly.

There was no evidence that during the proceedings against Biase in Omaha these appellants ever were together or communicated with each other, either directly or indirectly. (Tr. 164)

There is in this record no evidence that there was a conspiracy to prevent Sheetz testifying against Biase in Omaha or that appellants were parties to any such conspiracy.

In the case of *Parr* v. *United States*, 363 U.S. 370, 393, 80 S. Ct. 1171, the Court said (l.c. 1184):

> "[16] Inasmuch as the twentieth count charged petitioners with conspiring to commit the offense complained of in Count 1, and inasmuch as, on the facts of this record, that count cannot be sustained, it follows that petitioners' convictions upon the twentieth count cannot stand."

We are confident we have demonstrated that the Government failed to make a submissible case under the substantive counts of the indictment so the alleged conspiracy to commit such substantive offenses must also fail on that account as well as on account of the total lack of any evidence of conspiracy.

3. The Conviction of Appellants Without Evidence of the Essential Elements of the Offense Charged Denies Them Due Process of Law As Guaranteed under the Fifth Amendment to the Constitution of the United States.

We have pointed out under Point 1 above that essential elements of the crime charged are:

(1) that appellants had knowledge that Biase was being prosecuted in the Federal Court at Omaha;

(2) that appellants had knowledge that Sheetz might be a witness in that case; and

(3) that it was because Sheetz might be a witness in that case that the assault was made on him.

We have further pointed out under Point 1 above that there was no evidence of any of said essential elements.

Under such circumstances the convictions herein deprive appellants of due process of law in violation of their Constitutional rights under the Fifth Amendment to the Constitution of the United States.

Furthermore, there was no evidence of conspiracy under Count IV.

In the case of *Thompson* v. *City of Louisville*, 362 U.S. 199, 206, 80 S. Ct. 624, the Court said (l.c. 629):

> "Thus we find no evidence whatever in the record to support these convictions. Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt."

In the case of *Garner* v. *State of Louisiana*, 82 S. Ct. 248, the Court said (l.c. 251):

"* * * we hold that the convictions in these cases are so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment. As in Thompson v. City of Louisville, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654, our inquiry does not turn on a question of sufficiency of evidence to support a conviction, but on whether these convictions rest upon any evidence which would support a finding that the petitioners' acts caused a disturbance of the peace. In addition, we cannot be concerned with whether the evidence proves the commission of some other crime, for it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction."

While the above decisions are based on the Due Process Clause of the Fourteenth Amendment we submit that is immaterial since the Due Process Clause of the Fifth Amendment is generally construed to impose the same restraints on the Federal Government as the Fourteenth imposes on the States.

In the case of *Heiner* v. *Donnan*, 285 U.S. 312, 326, 52 S. Ct. 358, in an estate tax case the Court said (l.c. 361):

"[4] Nor is it material that the Fourteenth Amendment was involved in the Schlesinger Case, instead of the Fifth Amendment, as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. Coolidge v. Long, 282 U.S. 582, 596, 51 S. Ct. 306, 75 L. Ed. 562."

In the case of *Bowles* v. *Willingham*, 321 U.S. 503, 518, 64 S. Ct. 641, in an injunction proceeding under the Emergency Price Control Act, the Court said (l.c. 649):

"And the restraints imposed on the national government in this regard by the Fifth Amendment are no

greater than those imposed on the States by the Fourteenth. Hamilton v. Kentucky Distilleries Co., supra; United States v. Darby, 312 U.S. 100, 657, 61 S. Ct. 451, 85 L. Ed. 609, 132 A.L.R. 1430."

In the case of *Curry* v. *McCanless*, 307 U.S. 357, 369-370, 59 S. Ct. 900, in an estate tax case, the Court said (l.c. 907):

"If the 'due process' of the Fifth Amendment, U.S.C.A. Const., does not require us to fix a single exclusive place of taxation of intangibles for the benefit of their foreign owner, who is entitled to its protection, Burnet v. Brooks, 288 U.S. 378, 53 S. Ct. 457, 77 L. Ed. 844, 86 A.L.R. 747; cf. Russian Volunteer Fleet v. United States, 282 U.S. 481, 489, 51 S. Ct. 229, 231, 75 L. Ed. 473, the Fourteenth can hardly be thought to make us do so here, for the due process clause of each amendment is directed at the protection of the individual and he is entitled to its immunity as much against the state as against the national government."

4. The Trial Court Committed Prejudicial and Reversible Error in Overruling Objections of Appellants' Counsel to the Final Argument of the Special Assistant to the Attorney General of the United States in Charge of the Prosecution That He Believed Government Witness Sheetz and Vouched for Him.

Government counsel in his closing argument made the following unlawful, unprovoked and prejudicial argument (Tr. 370-372):

"The mere fact that a man, a witness, has a past criminal record doesn't mean that you must disbelieve him. That only goes to his credibility in case you want to disbelieve him. You didn't have to disbelieve him. I don't disbelieve him.

"Mr. Waters: Just a moment, please. We except to that, if the Court please, and ask that it be

stricken. The Court will instruct the jury as to the credibility of the witness.

"Mr. West: We object to the testimony of this man.

"The Court: There has been a lot of speculating from the defendants in this case. I don't know why it should be stopped now. He has a right to say what he pleases. What is your objection? The Court follows you and knows what is going on, and knows what you mean. What is your objection, Mr. Waters?

"Mr. Waters: The objection is that Mr. Krouse stated to the jury the law on the credibility of witnesses, and has furthermore made the positive statement of his personal opinion as to his belief in the witness, which is completely the function of the Court and jury.

"The Court: He is drawing his own inferences. Gentlemen, if you are going to get into that, I think you members of the Bar know that the lawyers should never express what they believe. They say what they believe the evidence shows, but what they believe doesn't mean anything. All of you have found out what it means. You don't express what you believe. What you think the evidence shows, that is your function for all of it. We apply it almost every day in the court room. Go ahead.

"Mr. Krouse: I put Sheetz on the stand and I vouch for him.

"Mr. West: If the Court please, I object to this testimony. I would like to make a record.

"The Court: All right.

"Mr. West: This man represents the United States Government. His information along that line might conceivably differ from the information that he has, information not before this jury, and we object to that as highly prejudicial and request an instruction to the jury—

"Mr. Waters: We object—

"Mr. Silverforb: We object—

"The Court: All three defendants join in it and it is overruled as to all three defendants.

"Mr. Krouse: The defense have already argued a statement that I have vouched for Sheetz as a witness and I do. There was never a witness who ever took a witness stand who was more impressive, who was more self-contained. Never did he ever give a single bit of back-talk. He told his story as he knew it. * * *"

None of the attorneys for the defense at any time argued whether Mr. Krouse vouched for or did not vouch for Sheetz as a witness, as he erroneously stated during the argument, and the Government has been invited to point out in the record where such a thing occurred but to date has been unable to do so.

In the case of *Berger* v. *United States*, 295 U.S. 78, 88-89, 55 S. Ct. 629, the Court stated the law as follows (l.c. 633):

"[8] The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may proscute with earnestness and vigor —indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney,

will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. The court below said that the case against Berger was not strong; and from a careful examination of the record we agree. Indeed, the case against Berger, who was convicted only of conspiracy and not of any substantive offense as were the other defendants, we think may properly be characterized as weak —depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record.

"In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming,' a different conclusion might be reached. Compare Fitter v. United States, (C.C.A.) 258 Fed. 567, 573; Johnson v. United States, (C.C.A.) 215 Fed. 679, 685, L.R.A. 1915A, 862; People v. Malkin, 250 N.Y. 185, 201, 202, 164 N.E. 900; State of Iowa v. Roscum, 119 Iowa, 330, 333, 93 N.W. 295."

In the case of *Greenberg* v. *United States*, 1 Cir., 280 F.2d 472, the defendant was found guilty of filing a false and fraudulent income tax return. In condemning the argument of the United States Attorney the Court there said (l.c. 474):

"In vigorous language he expressed his personal opinion of the trustworthiness of the government's evidence and the consequent guilt of the accused. Upon objection interposed, the court ruled in the presence of the jury that the prosecutor had a right to argue 'his belief in the evidence.' Counsel continued, and the court overruled a second objection, but expressed a caution. The argument was then repeated.

"Rule 15 of the Canons of Professional Ethics of the American Bar Association reads,

'It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.'

"Government counsel stated in oral argument before us that this was 'inapposite' because he is an 'advocate.' We are not clear whether he disapproves of the principle, or whether he considers himself outside of it. In either event we disagree. To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing. The resolution of questions of credibility of testimony is for impartial jurors and judges. The fact that government counsel is, as he says, an advocate is the very reason why he should not impinge upon this quasi-judicial function. We believe the canon to be elemental and fundamental. See also 1 Bishop, New Criminal Procedure § 993 (2d Ed. 1913); 6 Wigmore, Evidence, § 1806 (3d Ed. 1940).

"It is true that special circumstances, such as a personal attack upon counsel, may occasionally justify a reply. See, e. g., United States v. Socony-Vacuum Oil Co., Inc., 1940, 310 U.S. 150, 240-242, 60 S. Ct. 811, 84 L. Ed. 1129; Gridley v. United States, 6 Cir., 1930, 44 F.2d 716, 739; United States v. Battiato, 7 Cir., 1953, 204 F.2d 717, 719. Too much has sometimes been read into these cases due in part, perhaps, to language in some of the opinions.' To the extent that cases may be found that permit counsel to state their personal belief as a matter of course, we do not follow them. We agree with the statement that 'No one who is at all conversant with jury trials can fail to see the possible prejudice * * *'." State v. Gunderson, 1913, 26 N.D. 294, 297, 144 N.W. 659, 660.

In the present case there was no personal attack upon the United States Attorney and there was no justification for his stating he vouched for Sheetz thereby throwing the full weight of his position and prestige as the representative of the United States sent directly from Washington behind the credibility of Sheetz.

We submit the opinion of the Court of Appeals herein approving the argument of the Special United States Attorney is not only in direct conflict with the *Berger* and *Greenberg* cases, *supra*, but is also and for like reason in conflict with the opinions of other United States Courts of Appeals in the following cases: *Wallace* v. *United States*, 4 Cir., 281 F.2d 656, 657; *Steele* v. *United States*, 5 Cir., 222 F.2d 628, 631; *Ginsberg* v. *United States*, 5 Cir., 257 F.2d 950, 954; *United States* v. *Spangelet*, 2 Cir., 258 F.2d 338, 342, and *Snipes* v. *United States*, 6 Cir., 230 F.2d 165, 167.

If ever a witness needed help from the prosecuting attorney, Sheetz did. He was the only witness identifying or in any way connecting appellants with this crime. All the other witnesses refused to identify appellants (Tr. 202, 221, 194) and all described the men they saw in such ways as to positively disprove these appellants could have been the assailants. (Tr. 194, 202, 198, 217) His identification was based on two fleeting glimpses under the most adverse conditions.

For approximately seven hours, from around ten o'clock in the morning until about 5:30 o'clock that evening, Sheetz refused to identify his assailants and then finally named appellants. (Tr. 183, 184, 186, 116, 210)

The record reflects that in 1939 Sheetz was convicted of four burglaries in Virginia and sentenced to 20 years. (Tr. 150, 151) He was later again convicted of burglary at Newport News, Virginia, and sentenced to five years and

was finally released in 1956. (Tr. 151) Sheetz admitted he has punched safes. (Tr. 159) Sheetz admitted he made three sales of narcotics to a young blond haired lady in Kansas City (Tr. 156, 157) and has pled guilty to purchase of narcotics in the Western District of Missouri. (Tr. 160) Although Sheetz was arrested during September, 1959, for said purchase, he has not yet been sentenced. (Tr. 105) Sheetz further made three or four purchases of narcotics in Omaha, Nebraska, during 1959. (Tr. 101) Immediately before the shooting, Sheetz drove up to his house in an air-conditioned Cadillac (Tr. 159) which had a loaded automatic pistol underneath a newspaper on the front seat (Tr. 263) and three boxes of tools including punches and a sledge hammer in the back (Tr. 264). Sheetz testified he had punched safes. (Tr. 159) It is submitted the above evidence showed Sheetz is an habitual criminal and burglar and that without help from the United States Attorney his testimony must have been most unconvincing. We can conceive of nothing which could have been more prejudicial to appellants. This decision, if permitted to stand, will lead prosecutors to vouch for the credibility of their witnesses as a regular routine to the subversion of justice in jury trials, the fairness of which is guaranteed by the Constitution.

5. The Trial Court Abused Its Discretion in Overruling Appellants' Motions for New Trial Because of Newly Discovered Evidence (Cases Numbered 16909 and 16911 in the Court of Appeals).

(Appellants' motions in these cases were dismissed summarily and the record consists of the motion in Case No. 16909 and memorandum briefs of the parties. "Motion" herein refers to the motion in Cases Nos. 16909 and 16911. (Appendix pp. A11-A37.) "Tr." refers to the transcript in Case No. 16783, the main case.)

It is undisputed that the first law enforcement officer to reach Sheetz after he was shot was Officer Robert W. Sanders of the Kansas City, Missouri, Police Deportment. (Tr. 209)

In his deposition previous to trial (Motion 6, 3) and at the two State Court trials of Ferina (Motion 9, 8), and in this trial (Motion 7, 3) Officer Sanders testified consistently that at the scene of the shooting Sheetz refused to give description of the individuals or tell who assaulted him. In a deposition subsequent to the three trials, while appeal herein was pending, Officer Sanders admitted that in none of the three trials did he reveal the fact that Sheetz told him at the scene that two colored men with white handkerchiefs on their faces had shot him (Motion 3).

At the trial of this case Officer Sanders testified that Sheetz while at the scene wouldn't tell who shot him. (Tr. 209, 210)

At the trial of this case Sheetz testified that he didn't think he gave anybody a description of anybody who shot him until after his wife came to the hospital that night. (Tr. 138, 139, Motion 12)

In the first State trial Sheetz testified he didn't think he told Officer Sanders anything about the people who shot him (Motion 11).

After the three trials, when the rumor got around that Officer Sanders had made a police report which was inconsistent with his testimony in the trials in the three cases, a Court order was required to force the State to make the Sanders' report available to a defendant in a related case (Motion 12). This report further revealed a white handkerchief was found in Sheetz' hand when Officer Sanders arrived at the scene.

To appreciate the vital importance of this newly discovered testimony, it must be remembered that Mrs. Anna Mae DeWitt, a witness in all of the cases (put on by the defense in the State Court cases and put on by the Government in the Federal Court case) was at the scene and was the first one to see the two men as they ran from Sheetz' home, called the police to the scene and had the best and longest view of the men of any witness. (Tr. 197-200) She reported to the police immediately that the men were colored and testified in all three trials that the men who assaulted Sheetz were colored men. (Tr. 199, 200) The appellants, whom Sheetz finally named as his assailants on the evening of the day he was shot in the morning, were caucasians of Italian ancestry. (Tr. 139)

It was then developed for the first time, following trial of this case, that Sheetz told Officer Sanders at the scene of the shooting and within a few minutes thereafter, while he was writhing on the porch waiting for the ambulance, that "two colored males with white handkerchiefs over their faces shot him." (Motion 2, 3, 4) The exact quotation from Officer Sanders' report is: "He first stated it was two white men and then said it was 2 colored males with white handkerchiefs over their faces." (Motion, Exhibit No. 2)

The testimony of Officer Sanders pointed out above and the testimony of Sheetz referred to, we submit, reveal a pattern intended to conceal from appellants and their counsel the vital fact that Sheetz had a white handkerchief in his hand, within a few minutes after being shot, at the scene of the shooting and while he was writhing in pain waiting for the ambulance told Officer Sanders he was shot by "2 colored males with white handkerchiefs over their faces," which corroborated Mrs. DeWitt in her identification of two colored men, one with a white handkerchief which he removed from his face, and was directly con-

tradictory of his later identification of appellants, who are caucasians.

Government counsel did not deny the verity of the testimony and factual statements in appellants' motion for new trial for newly discovered evidence in their opposing suggestions in the trial court and in their brief in the Court of Appeals and did not deny their knowledge of the contents of the report of Officer Sanders but did deny the testimony of Officer Sanders was inconsistent with his report and did deny Government counsel owed any duty to reveal the contents of Officer Sanders' report. The Court of Appeals refused to grant a new trial on this ground, holding there was a lack of diligence on the part of defense counsel and no duty on the United States Attorneys. Appendix pp. A71-A74.

We submit that on its face the testimony of Officer Sanders was not the open, frank, full disclosure to be expected from a public police officer interested only in seeing that justice is done. His answers were obviously studiously designed to conceal the fact Sheetz told him he was shot by two colored men rather than two white men as he later claimed, and made to dovetail in with Sheetz' testimony to mislead appellants and their counsel. It was obvious to counsel for the State in the State Court trials and for Government counsel in this trial that appellants and their counsel were unaware of the existence of such evidence but no effort was made by the prosecution to bring out such evidence or to call this information to appellants or their counsel.

In the case of *Griffin* v. *United States*, 336 U.S. 704, 69 S. Ct. 814, the facts were: Petitioner was convicted of murder in the first degree and sentenced to death. At the trial Petitioner testified the killing was the outcome

of a quarrel in a card game when the deceased advanced with his hand in his pocket and told Petitioner he would kick Petitioner's teeth out and that Petitioner shot deceased in self defense. Petitioner's version of the occurrence was contradicted by five government witnesses who testified the argument had nothing to do with the card game but that an argument occurred over another matter, that Petitioner left and returned within ten minutes and immediately shot deceased who made no move. About a month before the date set for execution Petitioner filed a motion for new trial because of newly discovered evidence, it being that the attendant at the morgue had found an opened pen knife in the trousers pocket of the deceased and that the prosecutor knew of this at the time of trial but failed to introduce this circumstance or make it available to the defense.

The motion also alleged there was evidence that playing cards were on the floor immediately after the shooting which would tend to corroborate Petitioner's testimony that the card game was in progress at the time of shooting.

The Court there said (69 S. Ct. l.c. 815):

> "As to Griffin's discovery, after his conviction was affirmed, of the undisclosed knife in the pocket of the deceased, the Government conceded that it knew of this circumstance at the time of the trial and despite that knowledge neither introduced the fact in evidence nor felt any duty to make it known to the defense. The Government justified this on the ground that in its view the circumstance of the knife was inadmissible, since knowledge of its presence in the pocket of the deceased had not been communicated to Griffin either by sight or otherwise. This District Judge took this view of the law and denied the motion for a new trial.

• • •

"An appeal having been taken, the Government moved to dismiss the appeal on the ground that 'the issues raised by appellant's motion for a new trial were fully explored in the court below and that the disposition made of them by the trial court was manifestly correct.' The appeal was dismissed by a unanimous Court of Appeals, presided over by a judge than whom no one is more alert in protecting the rights of the accused.

"Unfortunately, the Court of Appeals evidently thought that the ground for dismissing the appeal was too clear to require explication. It dismissed the appeal without an expression of views regarding the admissibility of the evidence on which the claim for a new trial rests. It may well have done so on the ground that in the District evidence of this nature is inadmissible."

In reversing and remanding the *Griffin* case, *supra*, with directions to the Court of Appeals to decide the rule prevailing in the District of Columbia as to admissibility of uncommunicated threats, the Court said (l.c. 816):

"It seems to us more appropriate for the Court of Appeals to address itself directly to the issue of admissibility. This is so in order to rule out the inference that the Court of Appeals may, in applying United States v. Johnson, 327 U.S. 106, 66 S. Ct. 464, 90 L. Ed. 562, have deemed the denial of a motion for a new trial on the basis of newly discovered evidence solely a matter for the trial court's discretion.

"Were the Court of Appeals to declare that the controverted evidence was admissible according to the law prevailing in the District, it would have to consider further whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it. If the Court of Appeals had decided that the disputed evidence was not

admissible in the District of Columbia on a claim of self-defense and on that ground had sustained the denial of the motion for a new trial, there would have been an end of the matter. It is not to be assumed that this Court would have granted a petition for certiorari to review the ruling since the determination would have been a matter of local law as are the rules of evidence prevailing in the State Courts."

In the case of *Griffin* v. *United States*, 183 F.2d 990, upon remand of the above case by the Supreme Court of the United States, the Court of Appeals for the District of Columbia said (l.c. 991):

"The ultimate question is whether the District Court erred in refusing to grant a new trial when it appeared that after the homicide an open penknife was found in the same trousers pocket of the deceased in which his hand was, and that the prosecution knew at the time of the trial that such testimony was available but neither produced it in court nor disclosed it to the defense."

In reversing and remanding the case with instructions to the District Court to grant a new trial the Court of Appeals said (l.c. 992):

"We therefore adopt the following rule as the one we think should prevail in the District of Columbia. When a defendant claims self-defense and there is substantial evidence, though it be only his own testimony, that the deceased attacked him, evidence of uncommunicated threats of the deceased against the defendant is admissible. We agree with cases in which uncommunicated threats have been admitted although there were eye-witnesses.

"[3] The question remains whether a new trial should be granted. In remanding the case the Supreme Court said: 'Were the Court of Appeals to declare that the controverted evidence was admissible according to the law prevailing in the District, it would have

to consider further whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it.' 336 U.S. at pages 708-709, 69 S. Ct. at page 816. We think it would be too dogmatic. The appellant is therefore entitled to a new trial."

See to like effect: *Mejia* v. *United States*, 9 Cir., 291 F.2d 199 (3), following the Griffin case and reversing and remanding the case with directions to the trial court to grant a new trial because of newly discovered evidence.

See to similar effect: *Delbridge* v. *United States*, U.S. Ct. App., Dist. of Col., 262 F.2d 710, 712.

We submit that in here denying appellants a new trial because of the newly discovered evidence, the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court and in conflict with the decisions of the Ninth Circuit and the Court of Appeals of the District of Columbia.

In this close case, with Sheetz as the only identifying witness, we submit that as held by this court in *Griffin* v. *United States, supra*, it would "be too dogmatic, on the basis of pure speculation, to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it."

The newly discovered evidence here is not merely cumulative or impeaching.

The statement of Sheetz was made within a few minutes of the time he was shot, right at the scene while he was lying on the porch, in great pain and thrashing about (Opinion Court of Appeals, pp. 29, 30).

Such evidence was admissible as a spontaneous declaration or *res gestae*. *Lampe* v. *United States*, U.S. Ct. App.,

D.C., 229 F.2d 43, 45; *McQueen* v. *United States*, U.S. Ct. App., D.C., 262 F.2d 455; *Guthrie* v. *United States*, U.S. Ct. App., D.C., 207 F.2d 19, 22-23; *Bailey* v. *Branin*, 3 Cir., 279 F.2d 344, 346 (1).

This evidence was substantive evidence tending to prove Sheetz' assailants were two colored men and not these white appellants. *Travelers Ins. Co.* v. *Mosley*, 8 Wall. 397, 407, 19 L. Ed. 437, *et seq.*; *Southern Extract Co.* v. *Green*, 6 Cir., 103 F.2d 232, 233 (2); *Fort Street Union Depot Co.* v. *Hillen*, 6 Cir., 119 F.2d 307, 311; *Gaynor* v. *Atlantic Greyhound Corporation*, 3 Cir., 183 F.2d 482, 485.

While it is not in all cases an absolute bar to a new trial on the ground of newly discovered evidence, we submit the evidence here is more than merely cumulative. The newly discovered evidence in this case is different in kind; it is new evidence of a higher type or character. 66 C.J.S. 322, New Trial, Sec. 113, b.; 39 Am. Jur. 178, New Trial, Sec. 173.

CONCLUSION.

Wherefore, Petitioners pray that a Writ of Certiorari issue under the seal of this Court to the United States Court of Appeals for the Eighth Circuit to the end that this cause may be reversed outright, or that it be reversed and remanded for a new trial because of the prejudicial argument of the Special United States Attorney and the newly discovered evidence.

Walter A. Raymond

WALTER A. RAYMOND,

AND

Kenneth C. West

KENNETH C. WEST,

Counsel for Petitioners.

Of Counsel:

JAMES PATRICK QUINN AND
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Kansas City, Missouri.

amination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

CRIMINAL RULE 33. NEW TRIAL.

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

INDICTMENT.

The Grand Jury charges:

COUNT I.

1. That on or about March 22, 1960, one Kenneth Bruce Sheetz appeared as a witness before a grand jury duly empanelled and sworn by the United States District Court for the District of Nebraska, and gave testimony before such grand jury relating to certain violations of the laws of the United States by one Anthony J. Biase; that in so appearing and testifying before such grand jury, the said Kenneth Bruce Sheetz was a witness attending the United States District Court for the District of Nebraska.

2. That on or about March 22, 1960, the said grand jury for the District of Nebraska returned a true bill of indictment against the said Anthony J. Biase, charging him with the sale of certain narcotic drugs in violation of the laws of the United States.

3. That the said Kenneth Bruce Sheetz was and is a witness in the United States District Court for the District of Nebraska, in a matter pending therein, styled as United States of America versus Anthony J. Biase, No. CR.-0501.

4. That on or about June 20, 1960, at Kansas City, Missouri, in the Western Division of the Western District of Missouri, Anthony Cardarella and Felix Ferina wilfully, knowingly, unlawfully, feloniously and corruptly and by force did injure Kenneth Bruce Sheetz in his person on account of his having attended and having testified as a witness in the United States District Court for the District of Nebraska, as aforesaid, all in violation of 18 U.S.C. 1503.

COUNT II.

1. The Grand Jury re-alleges all of the allegations contained in paragraphs 1, 2 and 3 of Count I of this indictment, as fully as if set forth at length in this count.

2. That on or about June 20, 1960, at Kansas City, Missouri, in the Western Division of the Western District of Missouri, Anthony Cardarella and Felix Ferina wilfully, knowingly, unlawfully, feloniously and corruptly and by force did endeavor to influence, intimidate and impede Kenneth Bruce Sheetz, a witness in the United States District Court for the District of Nebraska, in a matter pending therein, styled as United States of America versus Anthony J. Biase, No. CR.-0501, in that the said Anthony Cardarella and Felix Ferina did injure the said Kenneth Bruce Sheetz in his person, all in violation of 18 U.S.C. 1503.

COUNT III.

1. The Grand Jury re-alleges all of the allegations contained in paragraphs 1, 2 and 3 of Count I of this indictment, as fully as if set forth at length in this count.

2. That from on or about April 1, 1960, to on or about April 30, 1960, at Kansas City, Missouri, in the Western Division of the Western District of Missouri, Carlton A. Young did wilfully, knowingly, unlawfully, feloniously and corruptly endeavor to influence, intimidate and impede the said Kenneth Bruce Sheetz, a witness in the United States District Court for the District of Nebraska, in a matter pending therein, styled as United States of America versus Anthony J. Biase, No. CR.-0501, in that the said Carlton A. Young did attempt to persuade and cause to be persuaded the said Kenneth Bruce Sheetz to refrain from testifying for, or otherwise cooperating with, the United States in the prosecution of said case, all in violation of 18 U.S.C. 1503.

COUNT IV.

1. The Grand Jury re-alleges all of the allegations contained in paragraphs 1, 2 and 3 of Count I of this indictment, as fully as if set forth at length in this count.

2. That commencing on or about March 22, 1960, and continuing to the date of this indictment, in the Western Division of the Western District of Missouri, Anthony J. Biase, Anthony Cardarella, Felix Ferina and Carlton A. Young did unlawfully, wilfully, knowingly and feloniously combine, conspire, confederate and agree together and with each other and with others to this Grand Jury unknown, to defraud the United States of America and to commit offenses against the United States, to wit, to violate 18 U.S.C. 1503.

3. That it was a part of said conspiracy that the defendants would attempt to persuade, or cause to be persuaded, the said Kenneth Bruce Sheetz from testifying for, or otherwise cooperating with, the United States in the prosecution of the case styled as United States of America versus Anthony J. Biase, No. CR.-0501, pending in the United States District Court for the District of Nebraska, and to thereby influence, obstruct and impede the due administration of justice.

4. That it was further a part of said conspiracy that the said Anthony Cardarella and Felix Ferina would injure and assassinate the said Kenneth Bruce Sheetz, on account of his having testified as a witness before the said Grand Jury of the United States District Court for the District of Nebraska, and to influence, intimidate and impede him as a witness in the trial in said court of the case of United States of America versus Anthony J. Biase, No. CR.-0501, and to thereby influence, obstruct and impede the due administration of justice.

OVERT ACTS.

1. In furtherance of the aforesaid conspiracy and to effect the object thereof, in the Western Division of the Western District of Missouri, between the dates of April 1, 1960, and April 30, 1960, the said Carlton A. Young held various conversations with Mr. Kenneth Bruce Sheetz, relating to the testimony of, and availability of, Kenneth Bruce Sheetz as a witness in a matter pending in the United States District Court for the District of Nebraska, styled as United States of America versus Anthony J. Biase, No. CR.-0501.

2. In furtherance of the aforesaid conspiracy and to effect the object thereof, in the Western Division of the Western District of Missouri, on or about June 20, 1960, the defendants Anthony Cardarella and Felix Ferina did break open a door of the residence of the said Kenneth Bruce Sheetz at 4501 Michigan, Kansas City, Missouri, and did enter such residence.

3. In furtherance of the aforesaid conspiracy and to effect the object thereof, in the Western Division of the Western District of Missouri, on or about June 20, 1960, Anthony Cardarella, in the company of Felix Ferina, fired six shots from a .38 Special Caliber Revolver, with the intent and purpose of injuring and killing the said Kenneth Bruce Sheetz, all in violation of 18 U.S.C. 371.

A True Bill,

By _____,
Foreman.

Edward L. Scheufler,
United States Attorney,

J. Whitfield Moody,
Assistant United States Attorney,

O. J. Taylor,
Assistant United States Attorney.

JUDGMENT AND COMMITMENT.

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 20732.

United States of America,

vs.

Anthony Cardarella.

(Vio: Secs. 1503 and 371, T. 18, U.S.C.)

On this 12th day of May, 1961, came the attorney for the government and the defendant appeared in person and by counsel. Upon arraignment on July 22, 1960, defendant entered a plea of not guilty to Counts 1, 2 and 4 of the Indictment herein, the only counts where he is charged.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty by a jury on April 21st, 1961, of the offenses of feloniously and corruptly and by force did injure, a person, on account of his having attended and having testified as a witness in the United States District Court, District of Nebraska, as charged in Count 1; and, did feloniously and corruptly and by force did endeavor to influence, intimidate and impede a witness in the United States District Court, District of Nebraska, in a matter pending therein, as charged in Count 2; and, did feloniously conspire and agree with others to defraud the United States and to commit an offense against the United States, as charged in Count 4, of the Indictment herein, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on Counts 1 and 2, said sentence to be served concurrently with each other; and five (5) years on Count 4, to be served consecutively to the sentence imposed on Counts 1 and 2, for a total sentence of ten (10) years; without costs.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Approved as to form:

J. Whitfield Moody,
Assistant United States Attorney

The Court recommends commitment to: None recommended.

/s/ R. M. Duncan,
United States District Judge,

/s/ J. C. Truman,
Clerk.

A True Copy. Certified this 12th day of May 1961.

/s/ J. C. Truman,
Clerk.

(By) /s/ D.D. Daniel, Jr.,
Deputy Clerk.

JUDGMENT AND COMMITMENT.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 20732.

United States of America,

vs.

Felix Ferina.

(Vio: Secs. 1503 and 371, T. 18, U.S.C.)

On this 12th day of May, 1961, came the attorney for the government and the defendant appeared in person and by counsel. Upon arraignment on July 22, 1960, defendant entered a plea of not guilty to Counts 1, 2 and 4 of the Indictment herein, the only counts where he is charged.

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IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Approved as to form:

J. Whitfield Moody,
Assistant United States Attorney

The Court recommends commitment to: None recommended.

/s/ R. M. Duncan,
United States District Judge,

/s/ J. C. Truman,
Clerk.

A True Copy. Certified this 12th day of May, 1961.

/s/ J. C. Truman,
Clerk.

(By) /s/ D. D. Daniel, Jr.,
Deputy Clerk.

MOTION OF FELIX FERINA FOR A NEW TRIAL.

Comes now Felix Ferina, in accordance with Rule 33, Federal Rules of Criminal Procedure, and respectfully moves this Court to grant him a new trial on the ground of newly discovered evidence. Defendant Ferina states this evidence, as outlined hereinafter, has just come to the attention of this defendant and his counsel; that it was discovered for the first time following trial of the above matter and after the appeal presently pending in this matter under No. 16,783 was filed with the United States Court of Appeals for the Eighth Circuit; that although this defendant and his counsel made every effort to investigate this case prior to trial and used due diligence, the following described evidence, which goes to the very heart of this case and would undoubtedly have led to the acquittal of this defendant if it had been available at his trial, was effectively concealed and kept from this defendant and his said attorneys by false and misleading statements of Government witnesses. For the information of this Court, argument on the above described appeal of this matter in the Eighth Circuit Court of Appeals is presently set for December 5, 1961.

SUMMARY OF NEW EVIDENCE AND ITS IMPORTANCE.

Through three actual trials involving the same subject matter, including instant trial in this court, and during depositions taken in connection with these trials, there has consistently been testimony that Officer Robert W. Sanders of the Kansas City, Missouri, Police Department was the first officer to reach the scene after Sheetz was shot. On each of these occasions both Sheetz and Sanders have testified

in substance, as more fully set out hereinafter, that Sheetz refused to say who shot him and that Sheetz refused to give any description of his assailants to Sanders. You will recall that at the trial of this case, Sheetz, based on his alleged one-fifth of a second *glance behind a door in a darkened room*, testified he saw Appellant Ferina standing behind Cardarella; that Cardarella had no mask on and that Ferina had a black mask covering his face to a point below his eyes. Ferina and Cardarella are, as you saw, white men.

You will further recall that government witness Anna Mae DeWitt, the school teacher who saw the two men fleeing from the Sheetz house and called the police, described them as negro men and saw one of them removing a white handkerchief from his face. You will further remember that a knotted white handkerchief was found along the path the fleeing men took about a block east of the Sheetz house.

It Has Now Been Determined that in truth and fact Sheetz had a white handkerchief in his hand when Sanders found him and that he told Sanders the men who shot him were "2 colored males with white handkerchiefs over their faces" and that this description of Sheetz' assailants was immediately incorporated in a report Sanders submitted immediately after the shooting to his superior officer, which report was thereafter filed in the records bureau of the Kansas City, Missouri, Police Department, and is in Sanders' own handwriting. It has further been learned that immediately after the shooting Sanders filed a written "Complaint Report" relative thereto in which he described both suspects as being colored males.

Regarding this most amazing situation, in another case now pending in the Jackson County Circuit Court at Kansas City, Missouri, *State of Missouri* v. *Clyde North, Jr.*, No. C30842, in a deposition taken on October 14, 1961,

by Attorney Thomas A. Sweeny of the Kansas City Bar, Sanders testified under oath, l.c. 32:

Q. At any rate, the description that he gave you of the people as his brush with death became more serious and closer was two colored males with white handkerchiefs over their faces, isn't that what you put in your report?

A. Yes, sir, this was the last question I asked him. I didn't pursue it any further.

Q. Have you in any of the previous trials testified to that set of facts?

A. I don't recall what the testimony was in the other three trials.

Q. Officer, isn't it true that you have never testified before that Sheetz told you that two colored men with white handkerchiefs shot him?

A. I don't recall. I don't believe I was asked that question at all.

Q. Your recollection now is that you have never told any jury in any of the three trials about Sheetz' statement, specifically that two colored men with white handkerchiefs on their faces had shot him, isn't that correct?

A. That is correct.

Q. On your complaint report do you have what is called a description of suspects?

A. Yes, sir.

Q. And is one of the things you list in the description is whether or not a person is white or colored?

A. Yes, sir, that is correct.

Q. When you were asked by Mr. Kenneth West just one month, or several months after this shooting occurred, "Question, Did he give you a description of the people that shot him? Answer, Not a description, no.", did you say that to Mr. Kenneth West when he was interrogating you about the shooting on November 7, 1960?

A. The same way I answered you, no, he didn't give me a description. To me it isn't a description.

Q. Whether a man is white or colored is not a description?

A. It might be a partial description. A description is weight, color, height, and clothing.

Q. You certainly didn't tell Mr. West in this deposition anything about that statement Mr. Sheetz made to you?

Mr. Mason: That is argumentative.

A. I don't think I was asked.

Q. (By Mr. Sweeny) The next question I want to ask you is if in actual fact you didn't find a white handkerchief in Sheetz' hand?

A. I believe that was brought up before and I don't recall at this time.

Q. I want you to look at your report that you made the day of this shooting and see if that isn't so.

A. This isn't mentioned in the report, but the best I remember I think I can recall that Sheetz had a white handkerchief.

Q. Look at your longhand report, Officer. I am talking about this one you wrote out in longhand.

Mr. Mason: Apparently Mr. Sweeny has a report you don't have.

Mr. Sweeny: I do not, I got this right from the police files.

A. Let's see, yes, I see it now, that is right. That is right. Yes, I see it.

Q. (By Mr. Sweeny) That is in there, isn't it, the pry bar, revolver, and white handkerchief the victim had in his hand?

A. That is right. I recall that now, yes, sir.

In the same deposition described above taken in the North case, relative to the aforementioned reports he submitted, Sanders further testified, l.c. 27:

"Q. You have testified at the two Ferina trials here in Jackson County, and also the Ferina trial in Federal Court?

A. Yes.

Q. For the State and Government?

A. Yes, sir.

Q. And in connection with your testimony did you discuss with the prosecuting attorneys and the government attorneys the reports that you had made?

A. Yes, sir.

Q. And did you, of course, show them to them and discuss the contents of them?

A. As I recall it, I don't think it was necessary to show them any reports I had. They were discussed, however, the reports I had written.

Q. I see. In other words, these are matters that are used by the government attorneys in prosecuting these cases, are they not?

A. I assume they use them.

Q. You use them in aiding you in refreshing your memory on everything you found?

A. Yes.

Q. As a matter of fact, you have your report open in front of you now?

A. Right, sir.

Q. And likewise before you went on the stand in either of these three Ferina trials, you would have refreshed your recollection about your report?

A. I think I did on the original trial here in the county, and I don't recall, I may have but I don't recall really going through the reports, most of it was done by memory, because there were never any technical questions asked of me.

Q. Did you discuss before you testified in the Federal Court case or either of the Circuit Court cases what your testimony would be with the prosecuting attorneys?

A. I recall an interview a few days prior to the Federal Court trial with, I believe it was a Mr. Featherstone.

Q. That is the young prosecuting attorney or government attorney?

A. Yes, sir. And it was a very brief interview and that was the extent of it.

Q. How much time did you spend discussing your testimony with him?

A. I would estimate five to ten minutes.

Q. Did he have a copy there of your report?

A. He kept referring to a report. I assume it was one of mine.

Q. Did the report *gel* that he was referring to, did it *gel* with the report you had, coincide with your report?

A. I don't think I took a report with me to that interview. But it coincided with the facts as I recall them in the case."

As further new evidence, it has likewise been determined that shortly after completion of instant Trial Sheetz was paid the sum of Five Hundred Dollars ($500.00) by Mr. William A. Collet, Prosecuting Attorney of Jackson County, Missouri, in connection with his testimony against Felix Ferina. Collet admitted this under oath in a deposition taken in another matter on May 18, 1961, as set forth more fully hereinafter. While Collet stated this payment was for the time Sheetz spent in testifying in State Court, it is interesting to note the money was apparently not given to Sheetz until *after* he testified in instant trial in Federal Court. Ferina was acquitted and the state case against him was fully concluded during December, 1960. Collet estimated Sheetz was paid about two months before the time of the deposition taken on May 18, 1961.

Even more interesting, and showing the complete character of Sheetz and the fact his testimony is totally

unbelievable on any subject, is the fact that two days before Collet made the above admissions, on May 16, 1961, in the same case, Sheetz testified under oath, in a deposition, as set forth fully hereinafter, that he had received no compensation from the Jackson County Prosecutor's Office, the Jackson County Grand Jury, etc.

Sheetz appears to have been paid for his cooperation but willing to lie under oath to try and conceal this fact.

In view of the above described new evidence, the Court's attention is further directed to the following new development. In spite of the fact the State of Missouri and the Government have contended that Appellant Cardarella actually shot Sheetz, and this case is based on this allegation, on September 11, 1961, the State of Missouri, by the Prosecuting Attorney, dismissed its case No. C-30069 involving this shooting against Cardarella, entitled *State of Missouri* v. *John Cardarella.* A duly certified copy of this dismissal is attached hereto and made a part hereof by incorporation as *Exhibit 1.*

BACKGROUND DATA:

Government Witness Robert W. Sanders.

On November 7, 1960, a sworn deposition was taken of Robert W. Sanders, an officer of the Kansas City, Missouri, Police Department. He was the first law enforcement officer to the scene of the shooting of Kenneth Bruce Sheetz at 4501 Michigan, Kansas City, Missouri, on June 20, 1960. During this deposition, filed in the case of *State of Missouri* v. *Felix Ferina*, No. C-30070, In the Circuit Court of Jackson County, Missouri, at Kansas City, Sanders gave the following answers to the following questions:

Q. What did you find upon your arrival there?

A. Well, I found the man who was later identified as Kenneth Sheetz laying on the front porch of the residence

there at 4501 Michigan. He wasn't laying still; he was thrashing about.

Q. Did you talk to him?

A. Yes.

Q. Did he talk to you?

A. He mumbled, uttered.

Q. Could you understand him?

A. I—yes, and no. Yes, he did say some sentences.

Q. Did you ask him who shot him?

A. Yes.

Q. Did he tell you?

A. He said he knew, but he wouldn't tell me.

Q. He wouldn't tell you?

A. No.

Q. Did he give you a description of the people that shot him?

A. Not a description, no.

Q. What did he say about them?

A. Actually, he didn't say much about them. His main statements he made was, "Get me to the doctors" and I pried him for information, and he would answer yes and no to some of my questions.

Q. Was he in pain?

A. Severe pain.

Q. So would you say he knew what he was saying?

A. Well, it would be hard for me to say. It would take a medical man, I think. I thought the man would die before the ambulance got there.

Q. But that is the gist of your conversation with him that you have given us up to now?

A. Yes.

At the trial of this case in the United States District Court, which began on April 17, 1961, Sanders gave the following answers to the following questions on direct examination relative to what transpired after he found Sheetz

on the front porch at 4501 Michigan (Transcript pages 206, 207):

Q. Did you talk to him?
A. Yes, sir, I did.
Q. And what did you ask him?
A. I asked him if he knew who had done this to him.
Q. And did he answer?
A. Yes, sir, he did.
Q. What did he tell you?
A. He indicated that he did not. He said, "Yes".
Q. Did he answer yes to all the questions?
A. No, he didn't. He appeared to be a little hesitant. Of course, in his condition he didn't answer all my questions, but most of the questions I put to him he would either answer "yes" or "no".

On cross-examination at the trial in this court, Sanders gave the following answers to the following questions (Transcript pages 209, 210):

"Q. Officer, you were the first police officer to arrive at the scene of this shooting, weren't you?
A. Yes, sir.
Q. And when you arrived there you saw this man that you thought was about to die?
A. Yes, sir, I did.
Q. Now, Officer, you did talk to him, didn't you?
A. Yes, sir, I did.
Q. And he did talk to you, didn't he?
A. Yes, sir.
Q. Now, believing as you did that he was about to die, did you try to get him to say who shot him?
A. Yes, sir.
Q. And he wouldn't tell you, would he?
A. No, sir.
Q. Did you ask him what his name was?

A. Yes, sir.
Q. Did he tell you that?
A. No, sir."

Relative to the white handkerchief which it now appears was found in Sheetz' hand at the scene of the shooting, it is noted that in a deposition of Robert W. Sanders taken by and in behalf of defendant Ferina on November 7, 1960, in the case *State of Missouri* v. *Felix Ferina*, No. C-30070, In the Circuit Court of Jackson County, Missouri, at Kansas City, l.c. 8 and 9, Sanders, under oath, testified as follows:

Q. All right, sir. Aside from these things we have mentioned, did you find anything else out there, or see anything else out there?
A. Let me think.
Q. Did you see any handkerchiefs?
A. Let's see. It seems like a handkerchief entered into it somewhere, but I can't recall where.
Q. You didn't see any that you remember?
A. I will tell you, without refreshing my mind on those reports, I don't recall.
Q. You didn't find a handkerchief yourself?
A. No, I don't believe I did.

Under oath, during the first trial in the case *State of Missouri* v. *Felix Ferina*, No. C-30070, which began in Division No. 5, Jackson County Circuit Court at Kansas City, Missouri, on November 14, 1960, relative to what occurred when he first came to the scene of the shooting and found Sheetz, Sanders gave the following answers to the following questions on cross-examination:

"Q. Now, Officer, I want you to tell the jury whether you talked to him there?
A. Yes, I did talk to him.

Q. How long did you talk to him? Over what period of time?

A. Oh—

Q. Not continuously, but how long were you there talking to him?

A. I would say five mintues.

Q. Did you ask him who shot him?

A. Yes.

Q. What did he say?

A. Well, these were guttural remarks I got, because—

Q. What did he say that you understood?

A. I understood that he knew who shot him.

Q. All right, did he say that?

A. Yes.

Q. All right. Who?

A. Well, he wouldn't—he wouldn't answer that, as to who. He would thrash back again on the other side when I would try to pinpoint him down as to who shot him.

Q. How many times did you ask him who shot him?

A. Oh, I would say three or four times.

Q. What did he say?

A. He would thrash back over again, he wouldn't answer.

Q. Well, now what words did he use? You have told us what he said, what words did he use?

A. Well, he wasn't making—wasn't making any words himself, I was asking him questions and he would grunt, and I know when I asked him his name originally, I asked him who he was—

Q. Would he tell you?

A. He wouldn't tell me.

Q. He wouldn't tell you his own name?

A. No, sir, he didn't there."

GOVERNMENT WITNESS KENNETH BRUCE SHEETZ.

In a sworn deposition taken on July 27, 1960, in the case *The State of Missouri* v. *John Cardarella*, No. C-30069, In the Circuit Court of Jackson County, Missouri, after stating that Cardarella shot him and that Cardarella was in front of Appellant Ferina, Sheetz gave the following answers to the following questions:

"Q. Now, did either of those two men have anything over their faces?

A. Yes, the man in back had a—something dark across the lower part of his face.

Q. Across the lower part of his face?

A. Yes.

Q. Now, where exactly did that extend?

A. Oh, perhaps a half inch below the eyes.

Q. And on down?

A. Yes.

Q. Did it cover the entire lower portion of the face?

A. Right.

Q. And you say it was a cloth or what was it, exactly?

A. A dark cloth, I think."

Under oath, during the state trial of the same assault involved in this matter, in *State of Missouri* v. *Felix Ferina*, No. C-30070, Circuit Court of Jackson County, Missouri, Division No. 5, on November 14, 1960, on direct examination, Sheetz gave the following answers to the following questions:

"Q. Did either of them have on a mask?

A. Yes.

Q. Which one was it?

A. The one behind.

Q. And who was that?

A. Ferina."

On cross-examination in this same latter matter, Sheetz further answered questions as follows:

"Q. And the man behind him, now let's find out, what else did he have on?

A. A mask.

Q. What color of mask?

A. Dark. I don't know. I don't know whether it was black or blue or what it was, it was dark.

Q. When you say 'dark' you mean real dark then?

A. Yes, sir."

On further cross-examination in this same latter matter, relative to the arrival of Officer Sanders and his conversation with Sanders, Sheetz gave the following answers to the following questions:

"Q. But you talked to him, didn't you?

A. I did.

Q. And you refused to tell him your name, didn't you?

A. I did.

Q. Did he ask you who shot you?

A. He did.

Q. Did you tell him who shot you?

A. I did not.

Q. Will you tell this jury and this Court why, laying there with these holes in you, as you have testified to, you wouldn't tell the policeman who shot you?

A. I just didn't want to talk to him.

Q. Mr. Sheetz, you did talk to him, didn't you?

A. I didn't do it any more than I had to.

Q. Well, did you tell him anything about the people that shot you?

A. I don't think so, no, sir.

Q. Did you tell him you knew who shot you?

A. Yes, sir.

Q. So you did talk to him some, didn't you?

A. I did talk to him some, yes, sir.

Q. Well, will you tell the jury why you didn't tell him who shot you?

Mr. Gepford: Now, Your Honor, I will object to this as argumentative and repetitious, the witness has stated he just didn't want to talk, that he was ill and shot four times.

Mr. West: Now, he hasn't testified to that, Your Honor.

The Court: Yes, he has; sustained.

Mr. West: Sir?

The Court: Sustained.

Q. (By Mr. West) Did you have any other conversation with this officer at that time?

A. No, sir."

At the trial of this matter before this Court, Kenneth Bruce Sheetz testified on cross-examination (Tr. 138, 139):

Q. Now, when you were on the porch and called to a lady to call an ambulance, she understood you, didn't she?

A. I don't know, sir.

Q. Well, you had no conscious thought that you were dying there, did you?

A. Well, nothing except what the policeman told me.

Q. The policeman can't tell you how you felt.

A. I didn't think I was dying, no, sir.

Q. And you heard the policeman talk to you?

A. Yes, sir.

Q. And you answered him with words, didn't you?

A. I am sure I did, yes, sir.

Q. And he asked you who shot you, didn't he?

A. Yes, sir.

Q. And you wouldn't tell him?

A. No, sir. I wouldn't tell him anything.

Q. Wouldn't even tell him your name, would you?

A. I told him I was too sick to talk.

Q. But you were talking to him right then, you did talk to him, you said, "I am too sick to talk, I can't tell you my name," is that right?

A. No, sir.

Q. But you did talk to him?

A. Yes, sir.

Q. And you talked to other people at the scene?

A. Well, at least one.

Q. Now, you didn't tell anybody, give anybody any description of anybody that shot you until after your wife came up to the hospital that night, did you?

A. No, sir, I don't think so.

Q. She was the first person that talked to you?

A. After I was shot?

Q. Well, after you came out of the—they operated, didn't they, and after you came out from the operation?

A. I think so, sir. She was the most concerned.

DATA ON RECENT DEVELOPMENTS.

There is attached and made a part hereof by incorporation, as Exhibit 2, a copy of a written, longhand report regarding this case submitted and filed by Officer Robert Sanders on June 20, 1960, the date of the shooting, together with a copy of a complaint report form filed with the Kansas City, Missouri, Police Department records section on this same date (see Exhibit 3). These documents were obtained by Attorney Thomas A. Sweeny of The Kansas City Bar after the filing of appropriate motions in the case presently pending in the Jackson County, Missouri, Circuit Court, under No. C30842 entitled *State of Missouri* v. *Clyde North, Jr.*, which motions were filed after persistent rumors were heard that Officer Sanders did not testify in accordance with a written report he filed in the Ferina case.

Relative to the initial contact of Sheetz by Officer Sanders, and their conversation, the above described longhand report by Sanders states:

> "He requested aid and said that he had been shot, but refused to give his name. He also appeared hesitant about giving information about the suspects. He first stated it was two white men and *then said it was 2 colored males with white handkerchiefs over their faces.*" (Italics supplied)

You will further note the complaint report submitted by Officer Sanders at 11:00 A.M. on the day of the shooting, states the two suspects were colored males.

KENNETH BRUCE SHEETZ, in a deposition taken under oath on May 16, 1961, and filed in the case *State of Missouri* v. *John J. Halvey,* Criminal No. 30,891, Circuit Court of Jackson County, Missouri, at Kansas City, testified, l.c. p. 49, and gave the following answers to the following questions:

"Q. Did you receive any compensation from the State of Missouri, Missouri Police Department, Jackson County Sheriff's Office, Missouri State Highway Patrol—

A. No, sir.

Q. Jackson County Prosecutor's Office—

A. No, sir.

Q. —Jackson County Grand Jury—

A. No, sir.

Q. —or the City of Kansas City, Missouri?

A. No, sir.

Q. You received no compensation from them, whatsoever?

A. No, sir.

Q. Did you receive any remuneration from any of them—

A. No, sir.

Q. Were you paid a witness fee for your appearance and time before the Grand Jury—

A. No, sir.

Q. —Jackson County Grand Jury.

A. No, sir.

Q. —any of those agencies?

A. No, sir.

Q. Were you paid a witness fee for your appearance and time before the Grand Jury—

A. No, sir.

Q. —Jackson County Grand Jury.

A. No, sir.

Q. Were you paid any travel allowance?

A. No, sir."

WILLIAM A. COLLET, Prosecuting Attorney of Jackson County, Missouri, under oath, in a deposition taken on May 18, 1961, two days after the above mentioned deposition was taken from SHEETZ, also in connection with the case *State of Missouri* v. *John J. Halvey,* Criminal No. 30,891, Circuit Court of Jackson County, Missouri, at Kansas City, relative to testimony of Sheetz before the Jackson County, Missouri, Grand Jury, testified (l.c. 16, 17, 18, 19, 20) and gave the following answers to the following questions:

"Q. The prosecutor of this county has a fund, does he not, for the payment of witness fees and travel allowance?

A. Right.

Q. And that fund is used by your office in connection with witnesses that are testifying about criminal matters?

A. That is true.

Q. Now, to your knowledge, was this man, Sheetz, Kenneth Sheetz, paid anything by your office in connection with his testimony in this case?

Mr. Hutson: That will be objected to as being an improper question. It assumes that he was paid for his testimony. Do you wish to ask him—I am objecting to the form of the question. Do you wish to ask him if he was paid any money?

Mr. Schrader: Yes. That is what I thought I was doing.

The Witness: Well, I would answer it this way: It is my recollection—well, I am positive that he was paid from the contingent fund. I would further say that he was not paid for his testimony given before this grand jury.

Q. (By Mr. Schrader) Can you tell me how much he was paid?

A. I believe that he was given the sum of $500, but I would want to check our records on that. We do have records. In that connection, I might add that he, of course, appeared as a witness—

Mr. Earl Schrader: Just a minute, Bill. You have declined to answer that

Mr. Larence Schrader: He is not declining on this one.

The Witness: —to say that he appeared as a witness in the case of State versus Felix Ferina and was in court several days. He was also here and present with the grand jury in 1960, the summer grand jury. Well, he was—to amplify that, he appeared in both of the trials against Felix Ferina, the first trial which resulted in a hung jury, and in the second trial which resulted in acquittal for Mr. Ferina, and that—

Q. (By Mr. Larence Schrader) Can you tell me—

A. I was going to complete that this payment was for all of his time that he had spent as a witness and was not limited to anything that he might have done in this instance.

Q. Would this sum of $500, can you tell me when it was paid to him?

Mr. Hutson: Now, then—may I consult with the witness?

Mr. Larence Schrader: Sure, absolutely.

Q. (By Mr. Larence Schrader) I think my last question was, can you tell me when this sum of $500 was paid to him?

A. I can't tell you the exact date because I don't know. That would be a matter of record through our office. I do know that we caused a check to be prepared payable to him, and the date on the check stub of our contingent fund account would be the date in which the check was drawn and signed. Now, whether it was actually given to him on that date, I couldn't tell. I don't know the exact date. It is my recollection it has been within the past two months.

Q. That check is in the form of a warrant on the county, isn't it or do you recall?

A. Well, voucher or warrant, but—why, I would assume so.

Q. Your records would disclose when that was written, and so forth?

A. Right. That's right.

Q. Now, do I understand, then, that this sum was for witness fees and expenses?

A. Correct.

Q. Is that your recollection of it?

A. That is right.

Q. Who initiated the drawing of this check? Did you do it yourself—what I am getting at is, did you do it yourself, or were you requested by someone to do it?

A. I was requested.

Q. Will you tell me who requested it.

A. The request came to me from Larry Gepford.

Q. And he is—

A. —an assistant prosecuting attorney, who was the assistant who tried the case against Felix Ferina. He either asked me in person or called me one day, I don't remember which, as to whether or not we might be able to pay Sheetz something for his time in being a witness for the State, and I told him that I thought we could.

Q. Since that time and I believe that your recollection is that this money or this check was drawn in the last two months, let's say—

A. I would say so.

Q. Since that time, have you drawn or paid any other monies to him in connection with his—

A. To my knowledge, no. Now, to be absolutely certain, I would want to check our stubs for that account, but I am almost positive that there hasn't been any other check or payment made to him other than the one that I have testified to."

Defendant Ferina further and hereby offers to bring any and all of the exhibits, depositions and witnesses mentioned and described above herein before this court at such time and place as this court shall designate for the purpose of submitting and recording any further testimony in this matter which the Court believes desirable.

Wherefore, defendant hereby prays that this Court sustain this motion and grant him a new trial.

Respectfully submitted,

Raymond, West & Cochrane,
/s/ By Kenneth C. West,
Attorneys for Felix Ferina.

STATE OF MISSOURI)
) SS
COUNTY OF JACKSON)

Comes now KENNETH C. WEST, of lawful age, and having been duly sworn states that the data appearing in the above motion for a new trial in behalf of Felix Ferina are true and correct to the best of his knowledge and belief.

/s/ Kenneth C. West.

Subscribed and sworn to before me this ..... day of October, 1961, at Kansas City, Missouri.

.....

Notary Public in and for said County and State

My Commission expires:

This is to certify that three copies of the above motion together with three copies of suggestions in support thereof were by me on this 26th day of October, 1961, personally delivered to Honorable F. Russell Millin, United States Attorney, Room 549, U. S. Court House, 811 Grand Avenue, Kansas City 6, Missouri, plaintiff's attorney of record, marked for the attention of Allen J. Krouse and James J. Featherstone, Attorneys, Department of Justice, Washington, D. C.

/s/ Kenneth C. West,

Attorney for Felix Ferina.

EXHIBIT 1.

Be It Remembered, that on this, the 11th day of September 1961, the same being the 1st day of the regular September Term, 1961, of the Circuit Court of Jackson County, Missouri, at Kansas City, Missouri; there was presiding in Division Number 5 of said Court, designated under the rules of said Court as Criminal Division "A" to try Criminal causes, the Honorable Tom J. Stubbs before whom the following proceedings were had and made of record in the cause entitled:

State of Missouri,
Plaintiff,

vs.

John Cardarella,
Defendant.

No. C-30069 Assault with Intent to Kill, with Pistol, with Malice Aforethought.

Now on this day comes the Prosecuting Attorney and requests the Court to dismiss the above numbered and entitled cause.

Wherefore, it is ordered and adjudged by the Court, that said defendant, John Cardarella, go hence fully discharged hereof without day.

• • •

STATE OF MISSOURI)
) SS
COUNTY OF JACKSON)

I, John J. McFadden, Clerk of the Circuit Court, within and for the County and State aforesaid, do hereby certify that the above and foregoing is a full, true and complete copy of the Order in the above entitled cause, as same is on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at office at Kansas City, this 12th day of September, 1961.

John J. McFadden,
Clerk.

(Seal)

By /s/ Charles Modica,
Deputy.

EXHIBIT 2.

At 10:26 A. M. on 6-20-50 Case 156, P. 41, Robt. Sanders and 150, A/Sgt. Wayne Bradford, received a call to 45th and Michigan to investigate a reported shooting.

Upon arrival I observed the victim, Kenneth Sheetz, w/m, lying on the front porch of 4501 Michigan. The victim was suffering from a bullet wound in the stomach and undetermined injuries about the face. He requested aid and said that he had been shot, but refused to give his name. He also appeared hesitant about giving information about the suspects. He first stated it was two white men and then said it was 2 colored males with white handkerchiefs over their faces.

Mrs. Durwood DeWitt, w/Fe, 4246 S. Benton, WA 1-9302 who was driving past the house stated that she saw 2 colored males, one of which had a white handkerchief over his face, run from the rear of 4501 Michigan and go east on 45th Street. She could give no further description of the suspects.

Garry Pittman w/m 8, 4508 Michigan, WA 4-5295, stated he was standing at 45 and Michigan and saw the victim drive up to the house in a 1956 Blue Cadillac Cl. Mo. Lic.: X13-510 and approach the house. A moment later he heard approx. 4 explosions that sounded like gun shots.

My investigation revealed that the back porch door had been forced open and that part of the back door facing had been removed. The back door had pry marks in the vicinity of the lock and had also been forced open. A 15 inch pry bar was observed outside the house approx. 8 ft. from the rear door. A 38 Cal. Smith & Wesson Revolver serial # 223519, containing 6 empty shell cases, was observed on the ground approx. 20 ft. from the back door. Five holes, ap-

parently caused by bullets, were observed in the screen wire and door frame of the screened-in front porch and the holes were made in such a manner as to indicate that the bullets had been fired from within the house.

Victim removed to General Hospital by City Ambulance.

The pry bar, revolver, and a white handkerchief, the victim had in his hand, was released to Cruiser 91, Cpl. H. Hicks, who was called to process the scene.

Cruiser 23, Det. W. Cronley, was at the scene.

Robbery Detective Lowell Swindler at the scene.
Ptl. Robert Sanders.

EXHIBIT 3.

Kansas City, Missouri—Police Department

COMPLAINT REPORT

Reporting Officers:

A/Sgt. Wayne Bradford
Ptl. Robert Sanders
Date of Report 6-20-60
Time of Report 11:00 A. M.
Dist. Occurred 156

(√) Agg. Assault

Name of victim Kenneth Sheetz Res. Address 4501 Michigan last Sheetz first Kenneth middle Unk.

Bus. Address Unk Phones: Res. WA 1-6734.
Description of Victim:

Color W Sex M Age 45 Height 5-10 Weight 200 Hair Gray Eyes Brown.

Dressed black T shirt, gray trousers, brown shoes.

Date Occurred 6-20-60 Time 10:20 A. M. Place 4501 Michigan.

Means Used Bullet wounds.

Extent of Injury Bullet wound in stomach, lacerated face.

Relatives:

Name Kay Sheetz Address 4501 Michigan Relationship wife.

Witnesses:

Name None reported.

Discovered by Mrs. Durwood DeWitt Address 4246 S. Benton Phone WA 1-9302.

Reported by victim.

Victim Removed to General Hospital Order of self.

Conveyance City Ambulance.

Description of Suspects:

Name #1

Color C Sex M.

Name #2.

Color C Sex M.

Both last seen running east on 45th from Michigan.

Name of Homicide Officers Notified Det: William Cronley Time 11:00 A. M.

SUGGESTIONS IN SUPPORT OF MOTION OF FELIX FERINA FOR A NEW TRIAL.

It is respectfully submitted that the data outlined in the attached motion fully and satisfactorily comply with all of the requirements outlined and described in the various cases as desirable where such a motion can be granted, namely:

(a) The evidence has been newly discovered (since the trial of this matter);

(b) The facts alleged in themselves not only infer but in this case actually demonstrate diligence on the part of the mover;

(c) The newly discovered evidence is not of a merely cumulative or impeaching nature;

(d) The newly discovered evidence is such that on a new trial it would, since it strikes at the very heart of the Government's case, very probably produce an acquittal.

See: *Coates* v. *United States*, 174 F.2d 959, C.C.A. Dist. of Columbia;
Harrison v. *United States*, 191 F.2d 874, C.C.A. 5th;
United States v. *West*, 170 Supp. 200, l.c. 208;
Balestreri v. *United States*, 224 F.2d 915, C.C.A. 9th, l.c. 917;
Wagner v. *United States*, 118 F.2d 801, C.C.A. 9th.

This motion is being filed in accordance with Rule 33, Federal Rules of Criminal Procedure and, more particularly, as this rule has been interpreted by the Supreme Court of the United States in the following cases:

Mesarosh v. *U. S.*, 352 U.S. 1, 77 S. Ct. 1, 1 L. Ed. 2d 1;
Wolcher v. *U. S.*, 76 S. Ct. 254;

Krulewitch v. *U. S.*, 336 U. S. 440, 69 S. Ct. 716, 93 L. Ed. 798;

U. S. v. *Smith*, 331 U. S. 469, 67 S. Ct. 1330, 91 L. Ed. 1619;

Cleveland v. *U. S.*, 329 U. S. 14, 67 S. Ct. 13, 91 L. Ed. 12.

Wherefore, it is respectfully submitted that the attached motion of Felix Ferina for a New Trial should be granted forthwith.

Respectfully submitted,

Raymond, West & Cochrane,
By /s/ Kenneth C. West,
Attorneys for Felix Ferina

Appellant Anthony Cardarella filed an identical Motion for New Trial on the Grounds of Newly Discovered Evidence.

OPINION.

GRAVEN, Senior District Judge.

The appellants were tried in one joint jury trial. On May 22d, 1961, they filed notices of appeal from the convictions and sentences resulting therefrom. On October 26th, 1961, while those appeals were pending, they each filed in the trial court a motion for a new trial on the ground of newly discovered evidence under Rule 33 of the Federal Rules of Criminal Procedure. On November 15th, 1961, the trial court entered an order denying the motions. On November 16th, 1961, the defendants filed notices of appeal from that order. The original appeals, were argued in this Court on December 5th, 1961. Decision in those appeals was withheld pending the hearing on the appeals from the order denying their motions for a new

trial. This opinion covers both the original appeals and the appeals from the order denying the motions for a new trial.

The issues in the original appeals will first be considered. Some of the events which preceded the return of the indictment under which they were tried will first be noted. Early in September, 1959, Kenneth Bruce Sheetz, a resident of Kansas City, Missouri, was arrested by federal agents for the illegal sale of narcotics in that city. At the trial herein he testified that he had made such sales and previous sales. He further testified that he had purchased the narcotics sold by him from the defendant, Anthony J. Biase, a resident of Omaha, Nebraska. Following his arrest, Sheetz agreed to cooperate with the federal authorities in bringing to justice others engaged in the illegal distribution of narcotics. Bernard A. Theisen, Jr., a federal narcotics agent, was assigned to accompany Sheetz in uncovering those engaged in the narcotics traffic. In connection with that work, Theisen assumed the name of Joe Benedetto. Sheetz and Theisen went numerous places, including Omaha, Nebraska. Sheetz received a per diem allowance for his expenses from the federal authorities but received no compensation from them for his services. At Omaha Sheetz made contacts with the defendant Biase, and as a result of those contacts Biase made four sales of narcotics to Sheetz and Theisen. The purchases made by Sheetz and Theisen from Biase were the only purchases of narcotics made by them during their travels. The defendant, Anthony J. Biase, was generally known and referred to as Tony Biase.

During a session of a federal grand jury for the District of Nebraska in March, 1960, Sheetz appeared before it and testified as to the illegal sale of narcotics by Biase. On March 22d, 1960, that grand jury returned an indictment against Biase based on the sales of narcotics made

by him to Sheetz and Theisen. Biase was released on bail awaiting his trial under that indictment. On the forenoon of June 20th, 1960, two men identified by Sheetz as the defendants Ferina and Cardarella lay in wait inside the door of Sheetz' residence in Kansas City, Missouri. Upon Sheetz' return home and following his opening the door he was shot several times. Sheetz testified that during the shooting one of the two men said to him, "Here's something from Tony."

On July 14th, 1960, a grand jury for the Western District of Missouri returned the indictment in the present case. In Count I of the indictment the defendants Cardarella and Ferina were charged with injuring Sheetz because of his having testified as a witness before the Nebraska federal grand jury. In Count II the defendants Cardarella and Ferina were charged with endeavoring to intimidate Sheetz from being a witness in the trial of Biase to be had in Nebraska. In Count III Carlton A. Young was charged with endeavoring to intimidate and influence Sheetz from being a witness in the same trial. In Count IV Biase, Cardarella, Ferina and Young were charged with conspiring to injure Sheetz for his having testified as a witness before the Nebraska federal grand jury and to intimidate him from being a witness at the impending trial of Biase.

Counts I, II, and III were based on Section 1503, Title 18, United States Code. That Section provides, in part, as follows:

> "Whoever corruptly, or by threats or force, or by any threatening * * * communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States * * * or injures any party or witness in his person * * * on account of his * * * having attended such court * * * or on account of his testifying or having testified to any matter pending therein * * * or corruptly or by threats or force, or by any

threatening * * * communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Count IV is based upon the conspiracy statute, Section 371, Title 18, United States Code.

Following the indictments just referred to, Biase, in September, 1960, was tried and found guilty in Nebraska under the Nebraska indictment. Sheetz was subpoenaed as a witness at that trial but did not testify. Following his conviction Biase was sentenced to be imprisoned for fifteen years. He is presently serving that sentence.

At the trial of the present case, at the end of the Government's case in chief, each of the defendants made a motion for judgment of acquittal. The motion of the defendant, Carlton A. Young, was sustained. The motions of the other defendants were overruled. None of the defendants testified. The defendant Cardarella presented several witnesses. At the end of all the evidence each of the remaining defendants made a motion for judgment of acquittal. Those motions were overruled. The jury found the defendants Ferina and Cardarella guilty on Counts I, II, and IV and the defendant Biase guilty on Count IV. The trial court imposed five-year prison sentences upon the defendants Ferina and Cardarella under Counts I and II, the terms to run concurrently. The trial court imposed five-year prison sentences upon the defendants Ferina, Cardarella and Biase on Count IV. The prison sentences imposed upon the defendants Ferina and Cardarella on Count IV run consecutively to the sentences imposed upon them on Counts I and II.

The appellants, hereafter referred to as the defendants, make a number of contentions. Each of them contends that the evidence was insufficient to sustain their convictions. In that connection the defendants Ferina and Cardarella urge that the testimony of Sheetz identifying them as his assailants was lacking in credibility. The defendant Biase urges that evidence connecting him with Sheetz' assailants is lacking. All of the defendants contend that the chief trial attorney for the Government in his argument made improper statements in connection with the matter of the credibility of Sheetz as a witness. Each of the defendants contends that the trial court erred in failing to strike the testimony of certain witnesses. The defendant Biase contends that the trial court erred in not sustaining his objection to the testimony of Sheetz as to the statement, "Here's something from Tony."

Sheetz prior to 1956 had been convicted of burglaries in Virginia and had served prison terms under those convictions. In 1956, following the completion of those terms, he came to Kansas City, Missouri. In 1960, he and his wife were residing in a house in the residential portion of Kansas City. His wife operated a beauty shop and was away from home during the day. His means of livelihood in Kansas City was the subject of extensive inquiry at the trial. He testified that he worked for a concern that put in air conditioners, furnaces and plumbing. The defendants claimed that he was engaged in illegal activities. The only direct proof of illegal activities on his part during the period he resided in Kansas City was the proof relating to his sale of narcotics. It is manifest that Sheetz turned informer in the hope that by so doing he would be treated with leniency on the narcotics charge against him. No promises of leniency were made to him. Sheetz subsequently plead guilty to the narcotics charge but at the time of the trial in the present case had not been sentenced.

The events connected with the shooting as detailed by Sheetz will be next noted. On the forenoon of June 20th, 1960, at around 10:30 A. M., he went to his residence in Kansas City. His wife was at her beauty shop. It was a bright sunny day. The shades in the house were drawn. Upon arriving at his residence he unlocked and opened the door. He then noticed a movement behind the door. He looked in the direction of the movement and saw the defendants Ferina and Cardarella. Cardarella was standing in front of the two with a gun in his hand. Ferina had a dark colored handkerchief over the lower part of his face. Sheetz was first shot in the stomach. He then attempted to pull the door towards him, but it was pulled back. Sheetz then turned and started away. As he got a step away from the door he was shot in the back. The impact of the shot caused him to turn around and he then saw Ferina and Cardarella standing in the doorway. Sheetz was then shot through the head. As he fell down on the porch one of the two men said, "Here's something from Tony." It was Sheetz' recollection that Cardarella held the gun in his right hand and was not wearing glasses.

One of the matters the defendants strongly urged to the trial judge and vigorously argued to the jury was that Sheetz falsely identified Ferina and Cardarella as his assailants. The defendants make the same contention here. The evidence as to the background and activities of Ferina and Cardarella is somewhat meager. Cardarella's wife testified as a witness in his behalf. She testified that he had been unemployed during the last five years. It appears that Ferina and Cardarella engaged in golf. It appears that both are of Italian descent and that both belonged to an Italian social club in Kansas City. It also appears that Cardarella was known and referred to as Tiger Cardarella.

Cardarella presented witnesses who testified that he was left-handed and was so nearsighted that he wore glasses. He also presented witnesses who testified that he was at another place in Kansas City at the time of the assault.

The Sheetz residence was located at 4501 Michigan Street in Kansas City. It is located near the intersection of 45th Street and Michigan Street. Immediately following the shooting a motorist, Mrs. Anna DeWitt, an employee of the Kansas City School District, was driving east on 45th Street. She saw two men run from out a trellis at the rear of the Sheetz residence. One of them was wearing a white mask. The two men ran into the street and then ran east on 45th Street. She testified that she thought the man without a mask was a colored man. Mrs. DeWitt drove to a nearby grocery store and called the police. She drove back to the scene of the occurrence and waited until a police officer, one Robert W. Sanders, arrived. She then imparted her information to him. Included in that information was the information that the man without a mask appeared to be a colored man. Later she was shown a number of photographs, most of which were those of colored men. She was unable to identify any of the men whose photographs were shown her as being the man she saw. Mrs. DeWitt testified that the men she saw were not Ferina and Cardarella. Shortly following the shooting John Nelson, Jr., a city mail carrier, was delivering mail in the vicinity of 4500 Garfield Street, which was about two blocks east of the Sheetz residence. He saw two men proceeding in a hurried manner east on 45th Street. He testified that both men were white men and that one of them was of dark complexion whom he thought was an Italian. He was unable to identify Ferina and Cardarella as the two men he saw. Donald Erwin, a

truck driver, testified that at about the time in question he was driving a truck west on 45th Street. He testified that he saw two men running east on 45th Street; that he had just a passing glance at the two men; that neither of the men was colored; and that Ferina and Cardarella were not the men he saw.

Police officer Robert W. Sanders arrived at the scene while Sheetz was writhing in pain on the front porch. Sanders did not think Sheetz would live to get to the hospital. Heavy thick blood was coming out of Sheetz' mouth. He responded to questions by Sanders with difficulty. Sanders testified that Sheetz refused to tell him his name. He further testified that Sheetz said he knew who his assailants were but refused to tell who they were. The premises were examined by police officers. It was found that the rear door to the house had been forcibly entered. A metal prybar was lying on the walk leading to the rear door. A .38 caliber Smith & Wesson revolver was on the ground at the rear of the house. It contained six discharged cartridges. A blue glove was found in a bush near the house. About thirty minutes after the shooting Milton L. Roscoe, Jr., a boy seventeen years of age, found a knotted handkerchief about a block away from the Sheetz house. Later that afternoon, about a block and a half from the Sheetz house, he found a blue knit glove, a blue golf cap and a leather glove. A hair was found in the cap. An expert witness called by the Government testified that the hair was from the head of a person of Caucasian origin and not from the head of a Negro. Patrick J. Allegri, the manager of the Stayton Meadows Golf Course, testified that Ferina and Cardarella frequently played golf on that course. He further testified that in March, 1960, he sold Ferina a white golf cap of the same type as the blue golf cap found by the witness Milton L. Roscoe, Jr. He further

testified that in March, 1961, which was about a month before the trial in the present case, he met Ferina at a prize fight in Kansas City. Ferina said to him, "You lying son-of-a-bitch, you never sold me that cap."

Police officer Harry B. Hicks of the Kansas City Police Department Laboratory found some latent fingerprints in and around the rear door of the Sheetz house, but there was no evidence that the fingerprints were those of Ferina and Cardarella. Police officer Hicks took photographs at the scene of the occurrence. While taking pictures a white handkerchief was placed on his camera case. None of the articles found at or near the scene of the occurrence were of significance in the identification of Ferina and Cardarella. The belligerent statement made by Ferina to the witness Patrick J. Allegri as to the matter of the sale of a golf cap to him indicated that Ferina felt concerned about the matter.

Detective Sergeant Robert J. Kelly, Jr., of the Kansas City Police Department went directly from the scene of the shooting to the surgical ward in the hospital to which Sheetz had been taken and interviewed him briefly there. Kelly testified that Sheetz told him that he knew who shot him but he was not ready to tell. Sheetz testified that at the scene of the shooting he felt unable to carry on a conversation and that he was even weaker when he was interviewed in the surgical ward later on the same day. He was operated on that night. The next forenoon Sheetz stated to the police officers that Ferina and Cardarella were his assailants and identified photographs of them.

Sheetz testified at the trial that he was acquainted with both Ferina and Cardarella prior to the time he was assaulted. He testified that he had seen them playing

golf together and in a crap game together; that Ferina ordinarily addressed Sheetz by his first name; that he knew Cardarella as Tiger; that he had not participated in any activities with either of them; and that he knew of no reason for any ill will between either of them and himself.

A search made of the automobile driven by Sheetz just prior to the shooting disclosed a loaded revolver under a newspaper in the front seat and some tools in the back of the car. It was the claim of Sheetz that he felt he was a marked man and had the revolver in his car for his personal protection. The defendants claimed the tools found in the back of the car were burglary tools but the evidence as to that matter was inconclusive.

The claimed lack of credibility of Sheetz as a witness was continually urged by the defendants throughout the trial and was most vigorously urged by them in the jury arguments. The matter of the credibility of Sheetz as a witness was fully covered by the trial court in its instructions to the jury. In those instructions it was made clear that unless they found Sheetz to be a credible witness and believed his testimony the defendants could not be found guilty. The verdicts of the jury made it clear that its members did find that Sheetz was a credible witness and that they did believe his testimony. There are a multitude of decisions by federal appellate courts affirming convictions based on the testimony of informers with criminal records. Among such cases is the case of *United States* v. *Aviles*, (2d Cir. 1960), 274 F.2d 179. In that case the defendants had been found guilty of conspiracy to violate the narcotics laws. One Cantellops was a key witness for the Government. He had a long criminal record, including perjury before a grand jury. On appeal the appel-

lants laid great stress upon the character of Cantellops. The Court in its opinion stated (p. 190):

> "They argue that his testimony should have been stricken, that no defendant may be convicted on Cantellops' uncorroborated testimony, and that the indictment should have been dismissed. We do not agree. It was for the jury to judge the witness Cantellops on the basis of all that was brought out about his character, his previous activities * * *."

The Court further stated on the same page:

> "It is for the jury to say whether his testimony at trial is truthful, in whole or in part, in the light of the witness' demeanor, his explanations and all the evidence in the case."

The defendants Ferina and Cardarella in the present case vigorously attack the testimony of Sheetz relating to his identification of them as his assailants. They stress the testimony of the witnesses Mrs. Anna DeWitt, John Nelson, Jr., and Donald Erwin who saw the two men running away from the scene of the assault. It is well known that the identification of strangers based upon fleeting glances during exciting moments by even well-intentioned witnesses is fraught with the likelihood of mistake. In the present case the witness Mrs. Anna DeWitt was of the belief that the man she saw without a mask was a colored man. The testimony of the witnesses John Nelson, Jr., and Donald Erwin indicates that Mrs. DeWitt's belief was a mistaken one. According to Sheetz, his two assailants were not strangers to him but were acquaintances of his and that he saw them at close range. The recognition of acquaintances has some features which are not present in the identification of strangers. Where a person encounters an acquaintance there is brought into the situation past subconscious images and past conscious

images. Where a person encounters a stranger such person has only the present conscious image of the person observed. The defendants do not suggest any logical reason, motive or purpose on the part of Sheetz to falsely identify Ferina and Cardarella as his assailants out of all of his acquaintances. His acquaintanceship with them and his relationship with them had been of a friendly nature and there was no ill will on his part towards either of them. The claim that Sheetz was guilty of false identification or was mistaken in his identification of Ferina and Cardarella as his assailants was continually urged by them during the trial and was most vigorously urged by them in the jury arguments. The question as to the identification of Ferina and Cardarella was, under the record in this case, one for the determination of the jury. The jury determined that Sheetz truly and correctly identified Ferina and Cardarella as his assailants. Although Cardarella presented witnesses who testified that he was at another place in Kansas City at the time of the assault, the jury, by its verdict, determined that such was not the situation. Such a determination was within its province.

The assault made upon Sheetz by Ferina and Cardarella, standing by itself, would not constitute a federal offense under Section 1503, Title 18, United States Code. In order for the assault to have constituted an offense under that Section, it must have been made with knowledge on the part of the assailants of Sheetz' past conduct or expected conduct in connection with the federal narcotics charge then pending against Biase and either for the purpose of punishing him for his past conduct in relation thereto or intimidating him in connection with his expected conduct in relation thereto. The trial court made very clear to the jury in its instructions that the burden was upon the Government to establish those matters be-

yond a reasonable doubt and that unless the Government did so establish those matters Ferina and Cardarella should be acquitted. The jury, by its verdicts, found that the Government had so established those matters. The question then is whether the evidence was sufficient to sustain findings of the jury as to those matters. It is well settled that a jury in making its determinations, in addition to considering the facts which it finds are established by the evidence, may also take into consideration any proper inferences from those facts. It appears without dispute that Sheetz had turned informer and had brought about the indictment of Biase and that it was expected that he would be a witness in the trial of Biase under that indictment. There was sufficient evidence to sustain the finding of the jury that Ferina and Cardarella made the assault upon Sheetz and that in connection with the assault one of them made the statement, "Here's something from Tony." Biase objected to the testimony of Sheetz as to that statement, which objection was overruled. Ferina and Cardarella made no objection to the testimony as to the statement but disputed its probative effect. Ferina and Cardarella argue that Cardarella's first name was Anthony and that people with that first name are frequently called Tony. Sheetz testified that he did not know Cardarella as Tony but as Tiger. He further testified that nothing had ever occurred in his relationship with Cardarella which would give rise to any ill will towards him on the part of the latter. Sheetz further testified that he had never been involved in any matter with anyone by the name of Tony except Tony Biase. The substance of Sheetz' testimony in that regard was that the only Tony whose name would mean anything to him was Tony Biase.

The words, "Here's something from Tony," constituted a threatening communication. Neither Ferina nor Cardarella, so far as they were personally concerned, had any reason for making a threatening communication to Sheetz. Therefore, for Ferina to say that the assault was something from him would not add anything to what had already been made obvious by the assault itself. Unless it was in some way made known to Sheetz why the assault was being made, the assault itself would be left in the state of being a meaningless assault without apparent motive or purpose. It would seem unreasonable to suppose that Ferina and Cardarella would lay in wait for Sheetz and then proceed to assault him unless they had some motive and purpose for doing so. Since Ferina and Cardarella were acting together, the jury could properly infer that they had a common motive and purpose and that the communication made by one of them disclosed their common motive or purpose. Since the words used were not mere gibberish, the jury could properly infer that they were intended to convey some message to Sheetz. The jury could properly infer that the words used were intended to convey to Sheetz the message that he was being assaulted for a particular reason and that particular reason was related to and connected with Sheetz' conduct or expected conduct in relation to a certain Tony. The jury could properly infer that the spokesman for the two assailants knew that all that was necessary to bring home to Sheetz the reason for the assault was to refer to Tony. The jury could also properly find as a fact that the only Tony who would mean anything to Sheetz in that connection was Tony Biase and that both assailants knew that such was the situation. The jury could properly infer under those circumstances the words, "Here's something from Tony," were regarded by the assailants as being just as meaningful to Sheetz as the

words, "Here's something from Tony Biase," and that the omission of the last name of the latter was not of determinative significance. The fact that the assailants made known to Sheetz that the assault was being made upon him because of his past conduct or expected conduct in relation to Tony Biase would give proper support to the inference that they had knowledge of such past conduct or expected conduct. The only relevant past conduct of Sheetz in relation to Tony Biase was his conduct in connection with the Nebraska grand jury indictment, and the only relevant expected conduct of Sheetz in relation to Biase was his expected conduct in connection with the trial of Biase under that indictment. If the spokesman for the two assailants had stated at the time of the assault, "Here's something for you because you testified against Tony Biase before the grand jury and because you expect to testify against him at his trial," it could not be seriously contended that such evidence would not be sufficient to establish the motive and reason for the assault. In view of the surrounding circumstances, the jury could properly find that the statement in question conveyed what was in substance the same message, and the meaning of the message was known to both the assailants and Sheetz; and that since the assailants knew the meaning of the message they knew of the past conduct or expected conduct of Sheetz in relation to Tony Biase.

The evidence is sufficient to sustain the convictions of Ferina and Cardarella under Counts I and II of the indictment.

The defendants were also convicted of the conspiracy charge contained in Count IV of the indictment. That count also included Carlton A. Young and Biase. As heretofore noted, the trial court sustained the motion of Carlton A. Young for a directed verdict both on that count

and on Count III of the indictment. The matter of Biase's conviction under Count IV will be later considered. In Count IV the defendants therein named were, in substance, charged with conspiring to commit the acts set forth in Counts I and II. In order to convict the defendants Ferina and Cardarella under Count IV, it was not necessary for the Government to establish that they conspired with Young or Biase, or both. It would be sufficient if the Government established that Ferina and Cardarella conspired between themselves to do the acts set forth in Counts I and II. Since they were acting together in committing the acts charged in the substantive counts, the jury could properly find that they conspired to commit those acts.

The evidence relating to Biase, apart from the statement at the time of the shooting, will be next considered. Theisen, the federal narcotics agent who was with Sheetz in Omaha in connection with the purchase of narcotics, testified that in connection with those transactions Biase made statements which indicated that he was familiar with the narcotics traffic situation in Kansas City. Theisen testified that at Omaha when he was discussing with Biase the matter of securing heroin Biase told him that he would have to talk to Bennie Barone. He testified that he was informed by someone that he could get in touch with Biase through Bennie Barone. Sheetz testified that on occasions when he was in Omaha Bennie Barone was in the company of Biase. Sheetz did not have a telephone at his residence. He received his telephone calls at his wife's beauty shop. The Nebraska indictment was returned against Biase on March 22nd, 1960. Mrs. Sheetz testified that shortly thereafter Bennie Barone called her beauty shop seeking to get in touch with her husband. Barone did not get in touch with him. It appeared that following

the return of the indictment Mrs. Sheetz had some communications with Carlton A. Young about the matter of Sheetz having testified against Biase before the Nebraska federal grand jury. No connection was established between Carlton A. Young and Biase, Ferina and Cardarella. In summary, apart from the evidence as to the assault and what occurred during the assault, the Government's evidence as to Biase consisted of proof that Sheetz had brought about the former's indictment by a grand jury and it could reasonably be expected that Sheetz would be a witness against him at the trial under the indictment; and, that following the return of the indictment Bennie Barone, one of Biase's acquaintances, attempted to get in touch with Sheetz by long distance telephone. From the evidence relating to Sheetz' connection with the narcotics charge against Biase, it could be inferred that Biase would feel bitter towards him.

The charges against Ferina and Cardarella and their convictions on those charges were based upon their own acts. The fact that Ferina and Cardarella made it known to Sheetz at the time of the assault that it was being made because of his past or expected conduct in relation to Biase would not by itself make Biase criminally chargeable for the assault. Biase was not present at the scene of the assault and so far as the record shows was not even in Kansas City. In this connection it would seem that the use of a hypothetical situation would bring matters into a clearer focus. *A* is awaiting trial on a criminal charge and it is reasonably to be anticipated that *B* will be a witness against him. *C* and *D* wait for *B* at his city residence. *A* is not in the vicinity or even in the city. They state to *B*, "*A* has sent us to beat you up so badly that you will be unable to testify against him." They proceed to assault him. It is manifest that on the trial of *C* and *D*

on the charge of obstructing justice proof of the assault with the accompanying declaration would properly and adequately support their conviction on that charge. It is also manifest that on the trial of *A* on the same charge, absent other evidence connecting *A* with *C* and *D*, the proof would not be such as to sustain the former's conviction. The fact that *C* and *D* had made known to *B* that they were assaulting him because of his expected conduct in relation to *A* would give rise to the suspicion that *A* had arranged for the assault but such suspicion would not furnish an adequate evidentiary base for his conviction. It is also clear that the fact that the evidence would not be sufficient to hold *A* criminally responsible would not exonerate *C* and *D* from their criminal responsibilty.

To connect Biase with the occurrence at the Sheetz residence, the Government relies upon the theory of conspiracy and the closely related theory of agency. Biase claims that his alleged connection with that occurrence cannot be sustained upon either theory. In that connection he relies upon two well-known rules of law. One of those rules is stated as follows in the recent case *Tripp* v. *United States*, (10th Cir. 1961), 295 F.2d 418, 422:

> "The existence of the conspiracy cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged coconspirators done or made in his absence. Such declarations are admissible against him only where there is proof aliunde of his connection with the conspiracy."

The other rule relied on by Biase is stated as follows in 2 Jones on Evidence (5th Ed. 1958), p. 625:

> "The fact of agency cannot be established by the declarations of an agent, no matter how publicly made, * * *"

It is the view of the Court that Biase's reliance upon those rules of law is well placed. It is the holding of the Court that the evidence is insufficient to sustain the conviction of Biase. Biase assigns errors not referred to. In view of the holding of the Court just stated, it is unnecessary to consider them.

Ferina and Cardarella contend that the chief trial attorney for the Government was guilty of prejudicial misconduct in his argument to the jury. The Government summoned and presented as witnesses all who might have information which would be pertinent to the inquiry even though it was obviously known to it that several of such witnesses would give testimony which was favorable to the defendants. Among the witnesses summoned and presented by the Government were Mrs. Anna DeWitt, John Nelson, Jr., and Donald Erwin. As heretofore noted, they gave testimony which was favorable to Ferina and Cardarella in the matter of identification. The jury arguments appear in the record. The attorneys for the defendants made the first jury arguments. The attorney for Ferina in his argument urged the jury to give the highest credibility to the testimony of the three witnesses referred to and to give no credibility to Sheetz as a witness. In urging the jury to give the highest credibility to the testimony of the three witnesses referred to that attorney told the jury repeatedly they were Government witnesses and that by presenting them as witnesses the Government vouched for their credibility. The Government points out that in his argument that attorney did not suggest or intimate that in so far as the Government vouching for its witnesses was concerned the situation of Sheetz was the same as the situation of the three witnesses referred to. It was in this setting that the chief trial attorney for the Government made his closing argument. In that argu-

ment, after referring to the attacks made by the attorneys for Ferina and Cardarella upon the credibility of Sheetz as a witness, he stated: "You don't have to disbelieve him. I don't disbelieve him." The attorneys for Ferina and Cardarella made the objection that the attorney for the Government had made a positive statement of his personal opinion as to this belief in the witness Sheetz. In the presence of the jury the trial judge then stated:

> "He is drawing his own inferences. Gentlemen, if you are going to get into that, I think you members of the Bar know that the lawyers should never express what they believe. They say what they believe the evidence shows, but what they believe doesn't mean anything. All of you have found out what it means. You don't express what you believe. What you think the evidence shows, that is your function for all of it. We apply it almost every day in the court room. Go ahead."

The attorney for the Government then stated, "I put Sheetz on the stand and I vouch for him." The attorneys for all of the defendants then joined in the following objections: "This man represents the United States Government. His information along that line might conceivably differ from the information that he has, information not before this jury, and we object to that as highly prejudicial * * *."

Statements by a prosecuting attorney in his jury argument as to the credibility of witnesses which could be considered as an attempt on his part to furnish personal evidentiary support for his contentions is improper and in some settings has been held to constitute prejudicial misconduct. In support of their contentions the attorney for the Government was guilty of prejudicial misconduct in his argument to the jury, the defendants cite a number of cases. They cite and place reliance upon the case of

Greenberg v. *United States*, (1st Cir. 1960), 280 F.2d 472. The conduct of the prosecuting attorney in that case is described as follows (p. 474):

> "The United States attorney commenced his final argument by informing the jury that he was 'a sort of thirteenth juror [who] applies his training in the evaluation of evidence, in analyzing evidence, and tries to convey to the jury just what part the evidence plays in the presentation of a case' (a description we find quite inappropriate, since counsel, unlike a juror, is not required to be impartial). Near the end of his argument the United States attorney sought to put this self-appointment to use. In vigorous language he expressed his personal opinion of the trustworthiness of the government's evidence and the consequent guilt of the accused. Upon objection interposed, the court ruled in the presence of the jury that the prosecutor had a right to argue 'his belief in the evidence.' Counsel continued, and the court overruled a second objection, but expressed a caution. The argument was then repeated."

The Court held that the conduct of the prosecuting attorney constituted prejudicial misconduct and reversed the conviction. There are numerous cases involving the question as to whether the statements of a prosecuting attorney in argument constituted prejudicial misconduct They are collected in a recent annotation. 81 A.L.R.2d 1240. In the recent case of *Isaacs, et al.* v. *United States*, (8th Cir. March 22d, 1962) F.2d , Judge Matthes discusses the matter of the conduct of prosecuting attorneys in jury arguments.

In the case of *Lawn* v. *United States*, (1958), 335 U.S. 339, 78 S. Ct. 311, 2 L. Ed. 2d 321, in footnote 15, at pages 359-360, appears the following:

> "[15]Petitioner Lawn also contends that a statement made by the Government's attorney in his closing

> summation to the jury, saying, in pertinent part, 'We vouch for [Roth and Lubben] because we think they are telling the truth,' deprived him of a fair trial. No objection was made to the statement at the trial. The Government's attorney did not say nor insinuate that the statement was based on personal knowledge or on anything other than the testimony of those witnesses given before the jury, and therefore it was not improper. * * *"

The Court went on to state that the attorney for the petitioners in his summation had invited the reply.

In the case of *United States* v. *Klein*, (7th Cir. 1951) 187 F.2d 873, certiorari denied (1951) 341 U.S. 952, 71 S. Ct. 1021, 95 L. Ed. 1374, the Court states (p. 876):

> "It is hypercritical to say that because, in discussing testimony and its effect, a district attorney uses the words 'I know, etc.' he is thereby testifying on behalf of the prosecution. * * *"

It is not required that a prosecuting attorney in his jury argument continue to repeat in connection with every statement made by him the words, "as shown by the evidence and the proper inferences therefrom," if the jury understands that his argument is based upon the evidence and the inferences properly drawn therefrom. In the present case the attorney for the Government at the outset of his argument informed the jury he would demonstrate to it from the evidence adduced that the Government had a case against the defendants. In overruling the objection of the defendants to the statement in question, the trial judge stated, in substance, that he regarded the statement in question as being based on inferences drawn from the record in the case.

The jury argument of the attorney for Ferina left the possible erroneous implication that while the Government

vouched for the credibility of the Government witnesses whose testimony was favorable to the defendants it was unwilling to vouch for the credibility of Sheetz. It was proper for the attorney for the Government to correct that possible erroneous implication by making it known to the jury that the Government did vouch for the credibility of Sheetz.

Under the circumstances in this case, it would be difficult to infer that the attorney for the United States, by his argument, conveyed to the jury the idea that he had any information bearing on the credibility of Sheetz other than what was brought out at the trial. Sheetz was cross-examined at great length as to his previous life and activities, including his illegal activities. It would seem that in that situation there would not be much, if any, likelihood that the Government had any relevant information beyond the full information presented in court and that it would seem to be far-fetched to assume that the jury could possibly infer that by the statement in question the attorney for the United States meant to convey the idea that he had information bearing favorably on the credibility of Sheetz beyond that developed at the trial.

It is the holding of the Court that the claims of Ferina and Cardarella that the chief trial attorney for the United States was guilty of prejudicial misconduct in his argument to the jury are not well founded.

Ferina and Cardarella claim that the trial court erred in overruling their motions to strike the testimony of certain witnesses which were made at the end of the Government's case in chief. The Court has considered those assignments of error and finds them to be without merit.

The appeals by the defendants from the denial of their motions for a new trial on the ground of newly discovered evidence will be next considered.[1]

The matters to be considered in connection with a motion for a new trial, based upon newly discovered evidence, are stated in the leading case of *Johnson* v. *United States*, (8th Cir. 1929) 32 F.2d 127. In that case the Court set forth the requirements for the granting of a new trial upon the ground of newly discovered evidence. It stated (p. 130):

> "There must ordinarily be present and concur five verities, to-wit: (a) The evidence must be in fact, newly discovered, i. e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal. * * *"

While the decision in the case of *Johnson* v. *United States, supra*, antedated the adoption of the Federal Rules of Criminal Procedure, yet this Court in the case of *Connelly* v. *United States*, 1959) 271 F.2d 333, cited the former case and followed it as to the five requirements above set forth.

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1. Those motions were filed while the original appeals were pending in this Court. However, it was permissible for the trial court to entertain and deny the motions without asking for remand from this Court. Rule 33, Federal Rules of Criminal Procedure; *Smith* v. *United States*, (C.A. D.C. 1960) 283 F.2d 607, 610, 611, certiorari denied (1961) 364 U.S. 938, 81 S. Ct. 387, 5 L. Ed. 2d 369. If the trial court had determined that the motions should be granted, an application to this Court for a remand for that purpose would have been in order.

In the case of *United States* v. *Johnson*, (1946) 327 U.S. 106, 66 S. Ct. 464, 90 L. Ed. 562, a motion for a new trial on the basis of newly discovered evidence based upon the claimed perjury of a witness was denied by the trial court. The Circuit Court of Appeals reversed. Upon review the United States Supreme Court held that the Circuit Court of Appeals erred in doing so. The Court further stated (p. 112 U.S):

> "The trial judge's findings were supported by evidence. He had conducted the original trial and had watched the case against Johnson and the other respondents unfold from day to day. Consequently the trial judge was exceptionally qualified to pass on the affidavits. * * *"

The Court further stated (p. 112 U.S.) that a motion for a new trial on the ground of newly discovered evidence should only be granted where following the trial it clearly appears that, because of facts unknown at the time of trial, substantial justice was not done.

The Court further stated (p. 113):

> "While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. * * *"

In the case of *Connelly* v. *United States, supra*, this Court stated (p. 334):

> "By way of preface it may be stated that motions for new trial on the ground of newly discovered evidence are looked upon with disfavor and it is equally well settled that such motions are addressed to the judicial discretion of the trial court and its decision will not be reversed on appeal except for a clear abuse of that discretion. * * *"

In the present case the trial court, like the trial court in the case of *United States* v. *Johnson*, 327 U.S. 106, 112, had presided at the original trial and had watched the case unfold from day to day. There was presented to that Court in connection with the motions for new trial the same matters that are presented to this Court. The trial court, after considering those matters, denied the motions. It did not file a memorandum or make findings of fact. Under the applicable standard of review, the trial court's denial of the motions must be sustained unless it clearly appears that such denials constituted an abuse of discretion. Therefore, unless it appears that the showing made by the defendants satisfactorily met all of the requirements for a motion for a new trial on the ground of newly discovered evidence then it was not an abuse of discretion on the part of the trial court to deny their motions and the ruling of the trial court must stand.

There were two grounds for the motions. The first ground is that the police department reports made by police officer Robert W. Sanders contained items as to which he did not testify in the trial in the present case. The second ground of the motions relates to a payment made to Sheetz sometime after the trial in the present case by the Jackson County, Missouri, Prosecutor's Office. The first ground of the motions will be first considered. Because of the holding that the evidence was insufficient to sustain the conviction of the defendant Biase, only the defendants Ferina and Cardarella are concerned with the matter of a new trial. They will be hereinafter referred to as the defendants. In connection with the first ground of the motions, it is necessary to go back to some of the events which preceded the trial in the present case. The shooting occurred on June 20th, 1960. Shortly thereafter criminal proceedings were instituted in the state court of Jackson

County, Missouri, in which the defendants were charged with having committed the assault upon Sheetz on June 20th, 1960. Under the Missouri practice a defendant in a criminal proceeding may, in advance of trial, take the depositions of the prospective witnesses. The defendants made use of that procedure and the depositions were taken of police officer Robert W. Sanders, Sheetz, the school employee, Mrs. DeWitt, and others. Subsequently but prior to the trial in the present case two trials were had in the Jackson County state court based upon the assault. It appears that at those trials police officer Sanders, Sheetz, and Mrs. DeWitt testified as witnesses. The first trial was that of Ferina. It resulted in a hung jury. The next trial resulted in his acquittal. Subsequently on September 11th, 1961, following the trial in the present case, the charge against Cardarella was dismissed by the Prosecuting Attorney of Jackson County, Missouri. As heretofore noted, the first ground of the motions for a new trial relates to the testimony of police officer Robert W. Sanders. It is the claim of the defendants that in October, 1961, they for the first time learned that in the police department reports made by Sanders on June 20th, 1960, he reported that Sheetz had first stated to him that his assailants were two white men but later said they were two colored men and that he further reported that Sheetz had a white handkerchief in his hand.

Sanders made two police department reports, both dated June 20th, 1960. One report was made on a printed form entitled, "Complaint Report." That report does not contain any reference to any statements made by Sheetz. In it Sanders stated that the two suspects were colored men. Sanders' handwritten report, in part, was as follows:

"Upon arrival I observed the victim Kenneth Sheetz, W/M, lying on the front porch of 4501 Michigan. The victim was suffering from a bullet wound in the stomach and undetermined injuries about the face. He requested aid and said that he had been shot, but refused to give his name. He also appeared hesitant about giving information about the suspects. He first stated it was two white men and then said it was 2 colored males with white handkerchiefs over their faces.

"Mrs. Durwood DeWitt, W/FC, 4246 S. Benton, WA 1-9302 who was driving past the house stated that she saw 2 colored males, one of which had a white handkerchief over his face, run from the rear of 4501 Michigan and go east on 45th Street. She could give no further description of the suspects.
"* * *

"My investigation revealed that the back porch door had been forced open and that part of the back door facing had been removed. The back door had pry marks in the vicinity of the lock and had also been forced open. A 15 inch pry bar was observed outside the house approx. 8 ft. from the rear door. A 38 Cal. Smith & Wesson Revolver serial #223519, containing 6 empty shell cases, was observed on the ground approx. 20 ft. from the back door. Five holes, apparently caused by bullets; were observed in the screen wire and door frame of the screened-in front porch and the holes were made in such a manner as to indicate that the bullets had been fired from within the house.

"Victim removed to General Hospital by City Ambulance.

"The pry bar, revolver, and a white handkerchief, the victim had in his hand, was released to Cruiser 91, Cpl. H. Hicks, who was called to process the scene.
"* * *"

The defendants stress certain portions of the testimony given by Sanders in the taking of his deposition on November 7th, 1960. Those portions are as next set forth:

"Q. What did you find upon your arrival there?

A. Well, I found the man who was later identified as Kenneth Sheetz laying on the front porch of the residence there at 4501 Michigan. He wasn't laying still; he was thrashing about.

Q. Did you talk to him?

A. Yes.

Q. Did he talk to you?

A. He mumbled, uttered.

Q. Could you understand him?

A. I—yes, and no. Yes, he did say some sentences.

Q. Did you ask him who shot him?

A. Yes.

Q. Did he tell you?

A. He said he knew, but he wouldn't tell me.

Q. He wouldn't tell you?

A. No.

Q. Did he give you a description of the people that shot him?

A. Not a description, no.

Q. What did he say about them?

A. Actually, he didn't say much about them. His main statements he made was, 'Get me to the doctors' and I pried him for information, and he would answer yes and no to some of my questions.

Q. Was he in pain?

A. Severe pain.

Q. So would you say he knew what he was saying?

A. Well, it would be hard for me to say. It would take a medical man, I think. I thought the man would die before the ambulance got there.

Q. But that is the gist of your conversation with him that you have given us up to now?

A. Yes."

They also stress portions of the testimony given by Sanders in the first state trial. Those portions are as next set forth:

"Q. Now, Officer, I want you to tell the jury whether you talked to him there?

A. Yes, I did talk to him.

Q. How long did you talk to him? Over what period of time?

A. Oh—

Q. Not continuously, but how long were you there talking to him?

A. I would say five minutes.

Q. Did you ask him who shot him?

A. Yes.

Q. What did he say?

A. Well, these were guttural remarks I got, because—

Q. What did he say that you understood?

A. I understood that he knew who shot him.

Q. All right, did he say that?

A. Yes.

Q. All right. Who?

A. Well, he wouldn't——he wouldn't answer that, as to who. He would thrash back again on the other side when I would try to pinpoint him down as to who shot him.

Q. How many times did you ask him who shot him?

A. Oh, I would say three or four times.

Q. What did he say?

A. He would thrash back over again, he wouldn't answer.

Q. Well, now what words did he use? You have told us what he said, what words did he use?

A. Well, he wasn't making—wasn't making any words himself, I was asking him questions and he would grunt, and I know when I asked him his name originally, I asked him who he was—

Q. Would he tell you?

A. He wouldn't tell me.

Q. He wouldn't tell you his own name?

A. No, sir, he didn't there."

In his deposition taken on November 7th, 1960, Sanders also testified as next follows:

"Q. All right, sir. Aside from these things we have mentioned, did you find anything else out there, or see anything else out there?

A. Let me think.

Q. Did you see any handkerchiefs?

A. Let's see. It seems like a handkerchief entered into it somewhere, but I can't recall where.

Q. You didn't see any that you remember?

A. I will tell you, without refreshing my mind *on those reports*, I don't recall. [Emphasis supplied.]

Q. You didn't find a handkerchief yourself?

A. No, I don't believe I did."

The matter of the white handkerchief will be first considered. Mrs. DeWitt testified that she saw one of the men remove a white mask. Police officer Hicks testified that as he was taking photographs at the scene a white handkerchief was placed on his camera. The testimony of Sanders as to the white handkerchief in his deposition taken on November 7th, 1960, was to the effect that a white handkerchief entered into the occurrence somewhere but that he could not recall how without refreshing his memory from his reports. Sheetz testified in the trial in

the present case that the second man standing in the doorway wore a dark colored mask. In his argument to the jury, counsel for Ferina called attention to that testimony. He further stated:

> "There is not one piece of evidence in this case that is in any way connected. A handkerchief—somebody found it, at least, it was found in a police officer's camera case. Where did it come from? Heaven only knows. There is a white handkerchief for whatever it is worth."

The pertinent testimony given by Sanders in the trial in the present case will next be noted. After testifying as to being called to the scene of the occurrence, he testified as next set forth:

(*Direct Examination*)

By Mr. Krouse:

"Q. What did you do there when you arrived?

A. Immediately upon my arrival I observed a group of citizens in the intersection and they pointed to the residence at 4501 Michigan and I could see a body that was thrashing about on the front porch at 4501 Michigan and I went up on the front porch and I found Kenneth Bruce Sheetz laying on the front porch and thrashing about. He had been severely wounded by what appeared to be shots from a pistol. My first impression was that he had been shot in the face with a shotgun because his flesh was all open on his face and he had heavy thick blood coming out of his mouth.

Q. Did you talk to him?

A. Yes, sir, I did.

Q. And what did you ask him?

A. I asked him if he knew who had done this to him.

Q. And did he answer?

A. Yes, sir, he did.

Q. What did he tell you?

A. He indicated that he did not. He said, 'Yes.'

Q. Did he answer yes to all the questions?

A. No, he didn't. He appeared to be a little hesitant. Of course, in his condition he didn't answer all my questions, but most of the questions I put to him he would either answer 'yes' or 'no'.

Q. From what you saw of the man there on the porch did he give the appearance to you of being in bad physical shape?

A. I didn't think he would live to get to the hospital."

(Cross-Examination)

By Mr. West:

"Q. Officer, you were the first police officer to arrive at the scene of this shooting, weren't you?

A. Yes, sir.

Q. And when you arrived there you saw this man that you thought was about to die?

A. Yes, sir; I did.

Q. Now, Officer, you did talk to him, didn't you?

A. Yes, sir, I did.

Q. And he did talk to you, didn't he?

A. Yes, sir.

Q. Now, believing as you did that he was about to die, did you try to get him to say who shot him?

A. Yes, sir.

Q. And he wouldn't tell you, would he?

A. No, sir.

Q. Did you ask him what his name was?

A. Yes, sir.

Q. Did he tell you that?

A. No, sir."

While Sanders was called as a witness by the Government, he did not testify to anything that was unfavorable to the defendants. His testimony was, if anything, favorable to the defendants. He testified that Sheetz refused to give his name. He further testified that Sheetz indicated that he knew who his assailants were but refused to tell who they were. As heretofore noted, he was not questioned as to the matter of a white handkerchief. It would seem that the defendants cannot well argue that Sanders gave false answers to the questions put to him during the trial in the present case. One of their claims would seem to be that Sanders might have testified more favorably to the defendants than he did. However, the main thrust of the defendants' argument would seem to be that because of the testimony given by Sanders in his deposition hearing and in the state trials they were led to believe that he had fully recalled all of the details connected with the occurrence so far as he had seen or heard and that, therefore, they did not seek to ascertain what was contained in his police department reports.

In order to sustain a motion for a new trial on the ground of newly discovered evidence, a defendant must make it satisfactorily appear that his failure to discover such was not due to lack of diligence on his part. Usually a defendant in a criminal case hears the testimony of the key witnesses for the first time at the trial. Unless he correctly surmises in advance of the trial who the key witnesses are going to be and what they are going to testify to, he has little opportunity in advance of trial to check as to any conflicting or contradictory statements to be made by those witnesses. At the trial he can, following the direct examination of any witness, procure any statements made to the Government under the so-called Jencks statute. Section 3500, Title 18, United States Code.

Following the direct examination of Sheetz, the defendants requested and were given statements given by Sheetz to the Government relating to the subject matter of his testimony. The defendants were also given an opportunity to hear a tape recording made by Sheetz on June 23d, 1960. Neither at the conclusion of the direct examination of Sanders nor at any time during the trial was any request made by the defendants for any similar statements made by Sanders.

In the present case, because of the Missouri deposition practice and the two state court trials, there were presented numerous opportunities to the defendants to examine and re-examine all of the witnesses in the trial in the present case long in advance thereof as to all of the details relating to the charge. In July, 1960, the deposition of Sheetz was taken. He was examined and cross-examined as to the details of the occurrence, including what statements he made regarding his assailants. In November, 1960, the deposition of Sanders was taken. He was fully examined and cross-examined as to what was said to him by Sheetz and what he observed at the scene. At both state trials the witnesses, including Sheetz and Sanders, were again examined and cross-examined as to the details of the occurrence. Then at the trial in the present case the same witnesses were again examined and re-examined as to the same matters.

In the deposition of Sanders taken on November 7th, 1960, he made known to the defendants that he had made police reports as to the occurrence and that without having those reports to refresh his memory he had difficulty recalling some of the details of the occurrence. However, apart from that it is well known that police officers called to the scene of a crime or mishap do as a matter of police department routine make reports as to the occurrence.

It is well known that police officers have many calls to scenes of crimes or mishaps and that when called upon to testify as to an occurrence a considerable time after its happening their memories are likely to be blurred as to some of the details. For that reason it is not to be regarded as indicating lack of trust in the credibility of such an officer in a case in which he testifies for an attorney to check the report made by the officer at the time or request him to refresh his recollection from his report. This would seem to be especially so where such attorney had been informed in advance of the trial that the officer had made a report of the occurrence and had manifested some difficulty in recalling some of the details of the occurrence without the aid of such report.

At the time Sanders testified in the two state court trials and at the trial in the present case, the defendants knew from his deposition that he had made reports as to the occurrence. They also knew that from his deposition he had indicated that he experienced some difficulty in recalling some of the details of the occurrence absent those reports. At no time during the three trials did the defendants suggest or request that Sanders bring those reports with him or have them sent for so that they might be used in connection with his examination. There appears to be no reason for assuming that such suggestion would not have been acceded to or such request granted.

The situation would seem to be that it was made known to the defendants on November 7th, 1960, by Sanders that he had made police department reports as to what he had seen and heard at the scene and that he had difficulty in recollecting some of the details without the aid of such reports. There were then two state court trials and one federal court trial involving the same occurrence separated

by several months. Then in October, 1961, around six months after the last trial, the defendants for the first time checked into the matter of what was contained in the reports referred to by Sanders eleven months earlier. The defendants do not contend that they could not have secured access to those reports at any time following the occurrence if they had desired such access. The record plainly shows lack of diligence on the part of the defendants in the matter of discovery of the evidence in question.

In their arguments connected with the matter of diligence, the defendants charge the Government with suppression of the reports in question. The Government denies that charge. In its argument it vigorously asserts that it never had the reports in question and the record supports its assertion. The reports in question were not made to the Federal Government. They were made to the Kansas City Police Department and were a part of its records. There was no way in which the Federal Government could have prevented the defendants from having access to those reports if they so desired. Those reports were as available to the defendants as they were to the Federal Government. The defendants knew of the existence of those reports several months prior to the trial. In a deposition taken of Sanders in another proceeding subsequent to the trial in the present case, Sanders testified as to his contact with Federal officials in connection with the occurrence. He testified that a few days prior to the trial in the present case he was briefly interviewed by one of the Government attorneys in the case. It was Sanders' recollection that he did not have his reports with him. He further testified that during the interview that attorney had some report which he kept referring to and that the report that the Government attorney had seemed to coincide with the facts in the case. At

that time the witnesses the Government was going to present in the trial in the present case had already testified in two state court trials and had also testified by way of deposition. It would hardly be likely that the Government would have proceeded to trial in the present case without having a report or reports as to what the witnesses had testified to in the state court trials and in their depositions. Such reports would naturally include what Sanders had previously testified to. Under the circumstances it would seem more probable that at the time of the interview the report the attorney for the Government was referring to was a report of the previous testimony of Sanders than it was the police department report or reports in question. The defendants' charge that the Government suppressed the reports in question is wholly lacking in evidentiary support.

The other ground of the defendants' motions is based upon a $500.00 payment made by the State Prosecutor's Office to Sheetz sometime in May, 1961, after the trial in the present case. The exact date of the payment is in dispute. In another proceeding following the trial in the present case, William A. Collet, Prosecuting Attorney for Jackson County, Missouri, and Sheetz were examined as to the payment. It was the testimony of William A. Collet that the Prosecutor's Office had a contingent fund from which payments were made for witness fees and travel allowances for witnesses in criminal cases. He further testified that Sheetz spent considerable time being a witness in the two state court trials and that the payment was made to Sheetz pursuant to a request therefor by his assistant who handled those trials. William A. Collet further testified that the payment was made to Sheetz solely for all of the time he had spent as a witness in those trials. The defendants argue that because the payment was not made to Sheetz until after

he had testified at the trial in the present case the inference is to be drawn that the payment was made to him by the Prosecuting Attorney's Office as a reward for his testimony in that trial. The claimed inference is lacking in evidentiary support. Such being the situation, error cannot be predicated upon the refusal of the trial court to grant a new trial based on the evidence as to the payment in question.

It is the holding of this Court that the trial court did not abuse its discretion in denying the motions of the defendants for a new trial based on newly discovered evidence. In so far as the motions were based on the reports of Sanders, they were properly denied because of lack of diligence. In so far as the motions were based on the post-trial payment made to Sheetz by the Prosecuting Attorney's Office for Jackson County, Missouri, they were properly denied because of lack of evidentiary support for the claimed inference.

The trial court's denial of the motions of the defendants Ferina and Cardarella for a new trial on the ground of newly discovered evidence is affirmed.

The convictions of the defendants Ferina and Cardarella on Counts I, II, and IV of the indictment are affirmed.

The conviction of the defendant Biase on Count IV of the indictment is reversed.

The reversal of Biase's conviction renders moot his appeal from the trial court's denial of his motion for a new trial based on newly discovered evidence, and that appeal is dismissed as moot.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

No. 16,783. September Term, 1961.

Appeal from the United States District Court for the Western District of Missouri.

Felix Ferina,
Appellant,

vs.

United States of America.

This cause came on to be heard on the original files of the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment and sentence of the said District Court as to the defendant, Felix Ferina, on Counts I, II and IV of the Indictment be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Felix Ferina, do surrender himself to the custody of the United States Marshal for the Western District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the Mandate of this Court in the District Court.

April 17th, 1962.

JUDGMENT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

No. 16,786. September Term, 1961.

Appeal from the United States District Court for the Western District of Missouri.

Anthony Cardarella,
Appellant

vs.

United States of America.

This cause came on to be heard on the original files of the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment and sentence of the said District Court as to the defendant, Anthony Cardarella, on Counts I, II and IV of the Indictment be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Anthony Cardarella, do surrender himself to the custody of the United States Marshal for the Western District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the Mandate of this Court in the District Court.

April 17th, 1962.

Approved for the Court:

Clerk, United States Court
of Appeals, Eighth Circuit.

JUDGMENT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

September Term, 1961.

Appeal from the United States District Court for the Western District of Missouri.

Felix Ferina,
Appellant,
No. 16,908

vs.

United States of America.

Appeal from the United States District Court for the Western District of Missouri.

Anthony J. Biase,
Appellant,
No. 16,909.

vs.

United States of America.

Appeal from the United States District Court for the Western District of Missouri.

Anthony Cardarella,
Appellant,

No. 16,911.

vs.

United States of America.

These causes came on to be heard on the original files of the United States District Court for the Western District of Missouri, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from denying the motions of the defendants, Felix Ferina and Anthony Cardarella, for a new trial on the ground of newly discovered evidence, be, and the same is hereby; affirmed.

And it is further Ordered by this Court that the appeal of Anthony J. Biase in cause No. 16,909, be, and the same is hereby dismissed as moot.

April 17th, 1962.

Approved for the Court:

/s/ Robert C. Tucker

Clerk, United States Court of Appeals Eighth Circuit.

JOINT MOTION FOR REHEARING.

Petitions of Felix Ferina and Anthony Cardarella for Rehearing.

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT:

Petitioners, Felix Ferina and Anthony Cardarella, request rehearings in the above-entitled causes because of material matters of law and fact overlooked by the Court, and because of conflict between the opinion herein and opinions of the Supreme Court of the United States and of the United States Courts of Appeals for other circuits, and in support thereof, respectfully show:

1. This Court has overlooked the total lack of any evidence of the following essential elements necessary to make a submissible case under the alleged causes of action against these appellants:

(a) There is no evidence these appellants had any notice or knowledge there was a criminal prosecution in progress in the Federal Court at Omaha.

(b) There is no evidence these appellants had any acquaintance with or knew there was such a person as Anthony Biase.

(c) There is no evidence appellants knew Biase was being prosecuted in the Federal Court in Omaha for violation of the narcotics laws.

(d) There is no evidence appellants ever had any connection with or interest in narcotics or the narcotics traffic.

(e) There is no evidence that Appellant Ferina or Appellant Cardarella and Biase, who was discharged by this Court, had any common acquaintances or had ever communicated with each other, directly or indirectly.

(f) There is no evidence appellants had any notice or knowledge that Sheetz might be a witness in the Federal Court at Omaha.

(g) There is no evidence of any motive for appellants to be interested in preventing Sheetz from testifying against Biase in Omaha.

(h) There is no evidence Appellant Ferina or Appellant Cardarella had ever heard of Tony Biase and so even if either of them used the language claimed he could not have meant Tony Biase whom they had never heard of.

(i) There is no evidence that appellants or either of them had any notice or knowledge of, interest in or connection with the prosecution of Biase in Omaha.

(j) In the absence of knowledge of the prosecution of Biase in the Federal Court in Omaha and in the absence

of knowledge Sheetz might be a witness there could be no criminal intent on the part of appellants.

This conviction is unconstitutional under the due process clause of the Fourteenth Amendment to the Constitution of the United States because it is without any support in the evidence. *Thompson* v. *City of Louisville*, 362 U.S. 199, 206, 80 S. Ct. 624, 625 (1), 629 (13).

2. In ruling the evidence was sufficient to sustain findings of the jury against appellants on Counts I, II and IV (Opinion pp. 13, 16-19, 39) this Court overlooked and failed to apply the rule that the verdict in a criminal case is sustained only when there is substantial relevant evidence from which the jury could properly infer, beyond a reasonable doubt, that the accused was guilty.

In so ruling the Court overlooked the fact there is a total absence of evidence of the following essential facts: That appellants or either of them ever had any interest in or connection with narcotics or traffic therein; that either of them knew or had ever even heard of Biase; that either of them had any knowledge or notice that there was a prosecution going on in Omaha against Biase or anyone else for violation of the narcotic laws; that either of them had any notice or knowledge that Sheetz might be a witness in the Biase case in Omaha; that either of them had any interest or motive in preventing Sheetz from testifying against Biase in Omaha. The verdict against appellants, therefore, must necessarily rest on speculation, conjecture or prejudice and does not meet the requirements of the law as mentioned.

In ruling the evidence sufficient in this case the opinion herein is in direct conflict with the following decisions: *Mortensen* v. *United States*, 322 U.S. 369, 374, 64 S. Ct. 1037, 1040, 88 L. Ed. 1331; *American Tobacco Company* v.

United States, 328 U.S. 781, 787, 66 S. Ct. 1125, 1128, 90 L. Ed. 1575; *United States* v. *Hamrick*, 4 Cir., 393 F.2d 468, 470 (5); *Riggs* v. *United States*, 5 Cir., 280 F.2d 949, 954 (4, 5).

3. From the most favorable view point, the evidence (if it can be so dignified) tending to connect appellants or either of them with the prosecution of Biase in Omaha is entirely and totally circumstantial and extremely tenuous as evidenced by the belabored and hypothetical and generalized treatment of that most material issue in the opinion (Opinion pp. 14-16, 18-19) theorizing on how it might be thought possible that appellants were so connected with such prosecution, but never mentioning the many more rational and reasonable explanations for the obvious lack of evidence connecting appellants with the Omaha prosecution. The Court overlooked and failed to consider the more reasonable and probable explanation for Sheetz accusing Ferina and Cardarella, suggested by counsel for said appellants, to-wit: that Sheetz, a professional burglar, had been again dealing in narcotics while acting as stool pigeon for the Government and awaiting federal sentence on his plea of guilty on the narcotics charges; that he was shot by persons involved with him in narcotics traffic and he dared not let the Government find that out, so that after thinking it over during the day and into the evening after being shot he accused Ferina and Cardarella in the belief they could be made prime suspects as they were little and unimportant men of Italian ancestry who lived in the north end and so were vulnerable to suspicion and prejudice. If he could turn the suspicion of the Government against them and away from the real criminals he hoped to avoid exposure of his own nefarious activities while posing as a stool pigeon for the Government. For another example, the Court theory that the "Tony" mentioned in the alleged state-

ment of one of the gunmen was Tony Biase is based on pure speculation as Sheetz admitted he knew 3 or 4 Tony's (Tr. 104). One of the gunmen is alleged to have been named "Anthony" for which "Tony" is the most commonly known nickname and it is more reasonable to suppose a "Tony" worked up to such a pitch that he was lying in wait to kill Sheetz was more likely to be referring to himself than to some other "Tony" since there is no showing in the evidence appellants had ever even heard of Biase. Sheetz denied any of the other Tony's of his acquaintance had anything against him other than Biase but he also testified that Tony Cardarella had no reason to dislike him and had shown no ill feeling against him—making the conclusion of the court that he meant Biase pure speculation so the Tony's, other than Biase, are all even on that score (Opinion 14). In ruling the evidence sufficient (Opinion 14-16), the Court overlooked the total lack of any evidence appellants or either of them knew Biase was being prosecuted in Omaha or that Sheetz might be a witness and overlooked and failed to apply the elementary rule that when depending entirely on circumstantial evidence, as here, it must be consistent with a finding of guilt but inconsistent with any other reasonable conclusion.

In ruling the evidence here sufficient, the opinion herein is in direct conflict with the following decisions: *Panci* v. *United States*, 5 Cir., 256 F.2d 308, 312 (4); *Riggs* v. *United States*, 5 Cir., 280 F.2d 949, 955; *Cuthbert* v. *United States*, 5 Cir., 278 F.2d 220, 224-225 (5); *Tri-Angle Club, Inc.*, v. *United States*, 8 Cir., 265 F.2d 829, 833 (6); *Gravatt* v. *United States*, 10 Cir., 260 F.2d 498, 499 (2).

4. In belatedly, in this Court, discharging defendant Anthony J. Biase, the central figure in the alleged criminal activities (Tr. 86, 87) for which appellants were in-

dicted and tried, and in affirming the conviction of appellants on the basis of their own acts (Opinion pp. 18, 19), this Court overlooked the following facts: That there was no evidence whatever appellants or either of them ever had any interest in or connection with narcotics or traffic therein; that there was no evidence whatever that appellants or either of them had any acquaintance with Biase or even knew such a person existed; that there was no evidence whatever that appellants or either of them had any notice or information that Biase was being prosecuted for violation of the narcotics laws in Omaha; that there was no evidence whatever that appellants or either of them had any acquaintance with any person in Omaha, had ever been in Omaha or ever had any communications with or dealings of any kind with anyone in Omaha; that there was no evidence appellants or either of them knew or suspected Sheetz would be a witness in Omaha or had any interest in preventing him from testifying; that in consequence of appellants being charged and tried with Biase, thereby bringing into the case prejudicial evidence of Biase's dealings in narcotics (Opinion 17, 18) unconnected with appellants or either of them (which the court refused to strike on motions of this Appellant and Cardarella—(Opinion 24)), an impossible and prejudicial burden was placed on appellants in the trial of the case to try to prevent the transference of the evidence affecting only Biase from being transferred or by psychological effect charged against appellants, thereby poisoning the minds of the jury and greatly prejudicing them; that since the trial court in its charge to the jury (Tr. 451, 456, 457, 458) discussed the narcotics racket at length and with great emphasis and connected Biase, a convicted peddler, with appellants, it is impossible (especially in view of the complete vacuums in the evidence pointed out above) rationally or reasonably to

believe that the guilt of Biase was not transferred to appellants by psychological effect on the minds of the jury, to the great prejudice of appellants so as to secure this conviction in the state of the evidence here and calls for reversal.

In so ruling this opinion is in direct conflict with the decision in the case of *Kotteakos* v. *United States*, 328 U. S. 750, 767, 66 S. Ct. 1239, 1249; *Daily* v. *United States*, 9 Cir., 282 F.2d 818, 822 and *Brooks* v. *United States*, 5 Cir., 164 F.2d 142, holding a conviction thus obtained must be reversed.

5. In holding the evidence as to Biase and the narcotics racket and the Court's charge thereon was not prejudicial to appellants (Opinion 17, 18, 19, 39), this Court overlooked and failed to apply the controlling rule that, to hold such erroneous action harmless, the Court must be able to say with fair assurance, after pondering all that happened, without stripping the erroneous action from the whole, that the verdict was not substantially swayed by the error. In so ruling herein the opinion is in direct conflict with: *Kotteakos* v. *United States*, 328 U.S. 570, 765, 66 S. Ct. 1239, 1248; *United States* v. *Sansone*, 2d Cir., 206 F.2d 86, 88; *United States* v. *Gordon*, 7 Cir., 253 F.2d 177, 182 (7); *Canida* v. *United States*, 5 Cir., 250 F.2d 822, 824.

6. The Court overlooked the fact the discharge of Biase, the central figure in the alleged crimes, removes the hub and spokes of the alleged wheel (which never had a shadow of a rim) of conspiracy without which there is no evidence to sustain the conspiracy charge under Count IV and leaves the verdict on that count resting only on a pyramiding of inferences; to show and reach such finding it must be inferred that appellants had heard of Biase; it must be further inferred that they knew Biase

was being prosecuted in the Federal Court in Omaha; it must be further inferred that they knew Sheetz might be a witness in that case and it must be further inferred that for some unknown reason appellants were interested in preventing Sheetz testifying against Biase in that case.

In affirming such judgment based on evidence exposing such an obvious hiatus which this court attempts to overcome by the pyramiding of inferences, this opinion is brought into direct conflict with the following decisions: *Kotteakos* v. *United States*, 328 U.S. 750, 755, 66 S. Ct. 1239, 1243; *Canella* v. *United States*, 9 Cir., 157 F.2d 470, 478 (8); *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711, 63 S. Ct. 1265, 1269.

7. The Court overlooked and failed to consider the rule that the dignity of the United States Government will not permit conviction of any person on tainted and deceptive testimony such as that of Sheetz and Officer Robert W. Sanders, as revealed by the record in this case and the opinion herein. *Mesarosh* v. *United States*, 352 U.S. 1, 5, 77 S. Ct. 1 (1, 2, 4, 6).

8. The Court overlooked the fact that the specific intent to interfere with one known to be a possible witness in a court proceeding for the purpose of preventing him from testifying is an essential element of offense covered by Section 1503, Title 18, United States Code, and that such specific intent must be proved as an independent fact and cannot be presumed from the commission of the unlawful act.

In holding to the contrary, this opinion conflicts with the following decisions: *United States* v. *Randolph*, 7 Cir., 261 F.2d 234, 237; *Imholte* v. *United States*, 8 Cir., 226 F.2d 585, 590 (10); *Morisette* v. *United States*, 342 U. S. 246, 256, 72 S. Ct. 240, 246 (11).

9. In holding the Government Attorney was justified in stating he vouched for Sheetz, this Court overlooked the fact that upon defense counsel's objection being overruled the following occurred:

> "Mr. Krouse: The defense have already argued a statement that I have vouched for Sheetz as a witness and I do. There was never a witness who ever took a witness stand who was more impressive, who was more self-contained. Never did he ever give a single bit of back-talk. He told the story as he knew it. • • •."

This Court overlooked the fact the record does not support the statement of counsel that defense counsel had argued that Government counsel had vouched for Sheetz; that these appellants challenged such statement on page 79 of Appellant's brief in this Court and called on the Government Attorney to point out the place in the record where that occurred, but Government counsel have been unable to do so.

In holding it was not prejudicial error for the Government Attorney in this case, conceded even by the Government to be close on the issue of submissible evidence, to inform the jury he believed Sheetz, vouched for him, that there was never a witness more impressive and that he (Sheetz) told the story as he knew it (Tr. 370-372, Opinion 20, 21, 24) the opinion herein is in direct conflict with the following decisions: *Greenberg* v. *United States*, 1 Cir., 280 F.2d 472, 474; *Wallace* v. *United States*, 4 Cir., 281 F.2d 656, 667; *Steele* v. *United States*, 5 Cir., 222 F.2d 628, 631; *Snipes* v. *United States*, 6 Cir., 230 F.2d 165, 167 (2, 3); *Berger* v. *United States*, 295 U.S. 78, 88-89, 55 S. Ct. 628, 633.

10. In ruling the trial court did not abuse its discretion in overruling appellants' motion for a new trial be-

cause of newly discovered evidence, this Court overlooked the fact it stands admitted the issue of guilt is very close; that the evidence shows Officer Robert W. Sanders studiously deceived and misled appellants' counsel by repeatedly and consistently and under oath denying that Sheetz gave him any description of his assailants at the scene of the crime and before he was removed to the hospital, when in fact Sheetz had at that time told the officer he was shot by two colored males which was strong proof of appellants' innocence, corroborated the testimony of other Government witnesses, and flatly contradicted Sheetz' later claiming to identify these appellants as his assailants; that counsel in reliance upon the integrity and fairness of this police officer believed and relied upon his statement that Sheetz did not give any description of his assailants at the time and were thereby induced to refrain from investigating his reports; that such substantive and not merely corroborative evidence was vital as bearing on the main issue of who shot Sheetz, especially as Sheetz was the only one who attempted to identify these appellants, and evidence that Sheetz stated immediately after being shot that his assailants were colored would corroborate other Government witnesses and be conclusive substantive evidence of the fact that these white appellants were innocent of the charge made against them; that it was the duty of the prosecution to reveal this evidence; that its supression was wrongful whether due to negligence or intentional and was clearly prejudicial.

In ruling the trial court did not abuse its discretion in overruling appellants' Motions for a new trial on the grounds of newly discovered evidence under the facts of this record, the opinion herein is in direct conflict with the following decisions: *Mesarosh* v. *United States*, 252 U.S. 1, 11-12, 77 S. Ct. 1, 6, 7; *Berger* v. *United States*, 295 U.

S. 78, 84-89, 55 S. Ct. 628, 631-633; *United States* v. *Johnson*, D.C. Ct. App., 149 F.2d 30, 43; *Arbuckle* v. *United States*, D.C. Ct. App., 146 F.2d 657, 659 (5); *United States* v. *Consolidated Laundries Corporation*, 2 Cir., 291 F.2d 563 (1, 4, 6 and 8); *United States* v. *Stone*, 2 Cir., 291 F.2d 396; *Campbell* v. *United States*, 365 U.S. 85, 81 S. Ct. 421.

WHEREFORE, Appellants Felix Ferina and Anthony Cardarella pray the Court to set aside its opinion and judgment entered herein and grant them re-hearings in said causes.

ORDER OVERRULING MOTION FOR REHEARING.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

Nos. 16783 and 16908

Appeal from the United States District Court for the Western District of Missouri.

Felix Ferina.
Appellant,

vs.

United States of America.

Nos. 16786 and 16911

Appeal from the United States District Court for the Western District of Missouri.

Anthony John Cardarella,
Appellant,

vs.

United States of America.

Petitions of appellants for rehearing filed in these causes having been considered, it is now here ordered by this Court that the same be, and they are hereby, denied.

May 14, 1962.

ORDER.

In compliance with the Opinion and Mandate of the United States Court of Appeals reversing the judgment and sentence of this Court as to defendant Anthony J. Biase, on Count IV of the Indictment, the judgment and sentence entered by this Court on May 12, 1961, as to Anthony J. Biase, is hereby revoked and set aside and the Indictment heretofore returned by the Grand Jury on July 14, 1960, is dismissed as to defendant Anthony J. Biase.

It Is So Ordered.

/s/ R. M. Duncan,
Judge.

Dated at Kansas City, Missouri, this 29th day of May, 1962.

Attest: A true copy.
J. C. Truman, Clerk.
By /s/ D. D. Daniel Jr.,
Deputy.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

ANTHONY CARAMELLA AND FELIX FERONA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 203

ANTHONY CARDARELLA AND FELIX FERINA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgments of the court of appeals were entered on April 17, 1962, and a petition for rehearing was denied on May 14, 1962. The petition for a writ of certiorari was not filed until June 25, 1962. No application was made for an extension of time in which to file a petition for a writ of certiorari. The petition is therefore out of time under Rule 22-2 of the Rules of this Court.

There is, in any event, no occasion for further review of this cause. Petitioners were convicted in the United States District Court for the Western District of Missouri and given concurrent sentences of five years' imprisonment for the shooting of one Sheetz on account of his having testified in a federal grand jury proceeding against a seller of narcotics (Count 1) and for the forceful attempt to intimidate the witness (Count 2), and consecutive sentences of five years' imprisonment for conspiracy to commit the substantive offenses (Count 4). Petitioners challenge only the sufficiency of the evidence, the correctness of the trial court's ruling on argument by the government attorney, and the exercise of discretion by the trial judge in denying a new trial. These essentially factual questions are fully and, we submit, correctly disposed of in the opinion below (Pet. App. 37A-75A), which contains an extensive review of the evidence and discussion of the issues.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JULY 1962